

## HEARING EXAMINER'S REPORT AND RECOMMENDATION

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## I. STATEMENT OF THE CASE

Petition S-2642, filed April 4, 2005, requests a special exception under Section 59-G-2.16 for a drive-in restaurant, to be constructed on property located at 16575 South Frederick Avenue in Gaithersburg, Maryland, in the C-2 Zone, known as Parcel B of Section One, Walnut Hill subdivision, Tax Account No.16-09-00794560. Petitioner, Taco Bell of America, Inc. ("Taco Bell"), has leased the site from the owner of the shopping center.

Technical Staff of the Maryland-National Capital Park & Planning Commission ("M-NCPPC") reviewed the present petition and, in a report dated December 30, 2005, recommended *approval* with conditions.<sup>1</sup> See Ex. 32. Staff's recommended conditions were substantial, including one specifying shorter hours of operation than Petitioner proposed. The Staff Report specifically stated that without the recommended reduction in hours of operation, the proposed use would not be compatible with the general neighborhood. When asked at the public hearing whether Taco Bell would agree to the reduced hours proposed by Technical Staff, Taco Bell's principal representative at the hearing stated that he could not do so, for competitive reasons. Staff submitted a supplemental report, responding to questions posed by the Hearing Examiner, on January 12, 2006. See Ex. 36. The Montgomery County Planning Board ("Planning Board") considered this petition on January 5, 2006 and voted 3 to 1, with two members absent, to recommend *denial*. See Ex. 34. The Planning Board made the following findings:

- A drive-through restaurant is a special exception because it imposes particular compatibility issues. Allowing the establishment of the proposed use would be imposing compatibility problems on a site that is already afflicted with a compatibility problem. Indeed, if the request was for a Taco Bell Restaurant without a drive-through window, there would still be a problem of incompatibility, but the problem would clearly be worse with the drive-through. The proposed drive-through activity would be too close to the residential neighborhood and the existing fence along the shopping center's eastern boundary line would not be an adequate buffer.
- The landlord has been inflexible in terms of unwillingness to provide sufficient buffer to protect the adjoining community in a situation where buffering is already a short fall.

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<sup>1</sup> The Staff Report and supplemental report have been liberally paraphrased and cited in Part II of this report.

- A restaurant with a drive-through window produces more traffic than a restaurant without a drive-through window. In view of the fact that the intersection of South Frederick Avenue and North Westland Drive is not a signalized intersection, it is evident that the traffic situation in and near the shopping center would also be exacerbated by the drive-through restaurant use.
- The proposed hours of operation, including the hours that were recommended by staff, are not compatible with the residential neighborhood.
- The applicant's lighting study is unconvincing.

The member of the Planning Board who voted to recommend approval made the following findings:

The subject special exception site is an existing pad site that is going to be, for all practical purposes, enhanced by the proposed redevelopment. The problems that are cited in the public testimony and the subsequent discussion are not the problems of Taco Bell/Long John Silver's – the applicant. The problems already exist in the community and they are related to the shopping center itself but not necessarily to the applicant. I cannot recommend that the application be denied because of existing problems. Moreover, the proposed development would not add to the existing problems, rather, it could be used as leverage to improve existing conditions in the shopping center.

On May 19, 2005 the Board scheduled a public hearing in this matter for August 1, 2005, to be conducted by a hearing examiner from the Office of Zoning and Administrative Hearings. The hearing was later postponed, at Petitioner's request, to November 14, 2005 and finally to January 13, 2006. A public hearing was convened after proper notice on January 13, 2006, at which testimony and other evidence were received in support of and in opposition to the proposed special exception. A second hearing day was convened on January 25, 2006, at which the presentation of evidence was completed. The record was held open for one week to receive the transcript, and closed on February 1, 2006. By Order dated March 2, 2006, the Hearing Examiner extended the time for submission of her report and recommendation by two weeks, to March 24, 2006.

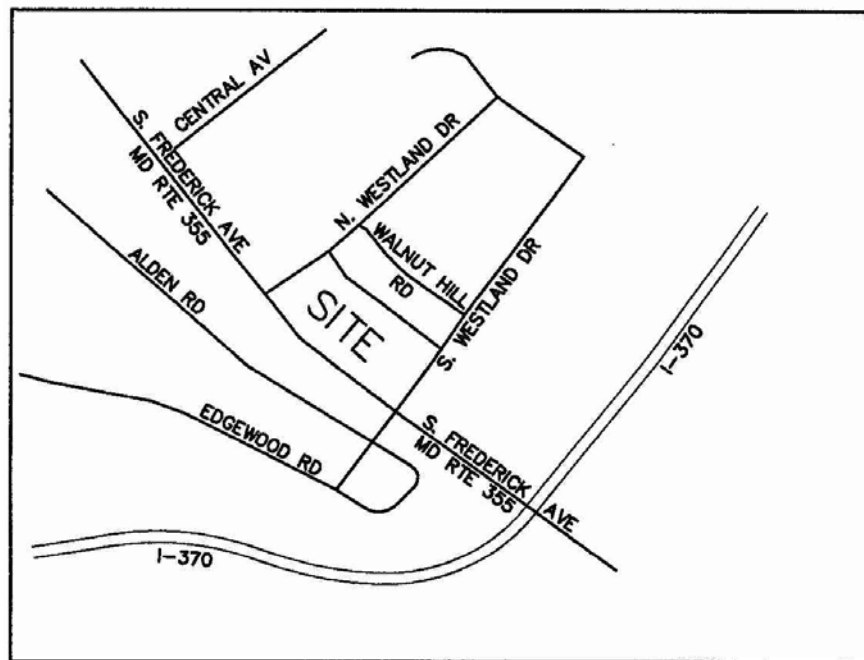
## **II. BACKGROUND**

For the convenience of the reader, background information is grouped by subject matter.

### ***A. The Subject Property and Neighborhood***

The subject property consists of a leased area of approximately 0.42 acres within the 7.8-acre Walnut Hill Shopping Plaza, which is located on the north side of South Frederick Avenue (MD Rte. 355) in Gaithersburg, between North Westland Drive and South Westland Drive. The shopping center occupies one long block, just north of the junction of I-270 and I-370, which is just north of the intersection of Rte. 355 and Shady Grove Road. Its general location may be seen on the map below.

**Location Map, excerpted from Ex. 60(a)**



The street address of the subject property is 16575 South Frederick Avenue, it is classified under the C-2 Zone. The special exception area would be limited to the area covered by Taco Bell's lease, which covers the proposed building location, the drive-through lane and incidental space around the building. No parking spaces are included in the leased area; parking would be shared with other shopping center tenants.

The Walnut Hill Shopping Center has a main level that faces Rte. 355. It is occupied by a Food Lion grocery store, a Maryland Department of Motor Vehicles service center, and various

restaurants and smaller retail establishments. The Food Lion is at the north end of the upper level.<sup>2</sup> The grade drops down sharply at the north end of the site, resulting in a lower level to the shopping center that extends along the north side of the Food Lion, facing the adjoining North Westland Drive. The lower level is accessed from the upper level on foot, via a staircase, or in a vehicle, by driving around a landscaped island that separates the upper and lower parking lots. It also has direct access from North Westland Drive. The lower level is occupied by a 24-hour 7-Eleven store, a music store, and an automobile parts store/repair shop does minor repairs. The proposed restaurant would be located in a new building, to be built across from the 7-Eleven, facing North Westland Drive, on the site of a slightly smaller building that was originally a bank with a drive-through window, and most recently was a tanning salon. The existing building would be demolished. Photographs of the site follow.

**Existing Building, Viewed from Parking Lot along Rte. 355.  
Ex. 40(a), top of page**



<sup>2</sup> Rte. 355 runs at a northwest/southeast angle at this location. For the sake of simplicity, this report will treat Rte. 355 as running north/south.

**View into Upper Parking Lot from Western Curb Cut on North Westland Drive  
Ex. 40(b), top photograph**



**View East Down North Westland Drive, Ex. 40(b), bottom photograph**



**Photograph of Fence and Dumpster along Eastern Property Line, Abutting Residences  
Excerpted from Community-Based Planning Memorandum Attachments to  
Staff Report, Ex. 32**



The Walnut Hill Shopping Center abuts North Westland Drive to the north, Rte. 355 to the west, South Westland Drive to the south and the Walnut Hill residential neighborhood in the R-200 Zone to the east. The proposed special exception site abuts shopping center parking lot to the east, west and south, and North Westland Drive to the north. Across North Westland Drive is a row of commercial establishments in the C-2 Zone – a Chevron gas station, an Italian restaurant, a small office building and undeveloped land for which an office building is proposed. Across Rte. 355 to the west are two churches, Good Shepherd Lutheran Church and Epworth United Methodist Church. The central difficulty in this case is that to the east, the shopping center parking lot is only a few feet from a property line that borders residential property. As a result, the yards of the abutting residences are separated from the shopping center parking lot – which would be used by Taco Bell customers – only by a wooden fence and a five-foot strip of land. Moreover, the entrance into the proposed drive-through lane would be in the same corner of the site, about 45 feet from the nearest residential property.



The unusual proximity of this shopping center to abutting single-family detached homes is the result of an error that was made in the 1960s, when the Walnut Hill Shopping Center was built. When the shopping center was approved, the rear portions of the abutting residential block were mistakenly thought to be commercially zoned property. Staff Report at 7. As a result, the shopping center was built without any required buffer between its parking lot and adjoining properties. In 1965, a corrective map amendment reclassified the abutting properties to the R-R Zone (now the R-200 Zone), but all along the block, the homes back onto parking and loading areas and the rear of the shopping center.

The relationship of the subject property to abutting and confronting land uses may be seen in the aerial photograph below.

**Aerial Photograph of Shopping Center and Immediate Environs  
Excerpted from Staff Report at 24**



Technical Staff suggests that the general neighborhood for this case be defined generally by Central Avenue to the north, Oakmont Avenue to the east, Westland Drive South to the south, and Rte. 355 and the City of Gaithersburg to the west. Land uses in this neighborhood include the abutting and confronting uses discussed above, plus additional office, retail and single-family residential uses in the C-2, R-90 and R-200 Zones. The historic Oakmont residential community, classified under the R-90 and R-200 Zones, is located across North Westland road, just northeast of the subject site. Staff Report at 3, 7. The neighborhood may be seen in the aerial photograph below.

**Aerial Photograph of Neighborhood, excerpted from Staff Report at 4**



### ***B. Master Plan***

The subject property is in the area covered by the *1988 Gaithersburg Vicinity Master Plan* (the “Master Plan”). Technical Staff reports that the Master Plan recommends the site of the Walnut Hill Shopping Center for continued C-2 zoning, and the land use map designates it as retail commercial. Continued R-200 zoning is recommended for the abutting single-family residential properties. Community-Based Planning Staff, which has responsibility for Master Plan interpretation, reports that the Master Plan contains no additional guidance for these properties, and concludes that the proposed use would conform to the Master Plan’s land use and zoning maps. Staff Report at 7. Community-Based Planning Staff goes on to say, however, that due to the unusual proximity of the subject site to its residential neighbors, the adjacent neighborhood would be adversely affected by the proposed use. *Id.* at 7-8. Community-Based Planning Staff cites adverse effects from vehicle noise, the drive-through speaker box, the sound of customers socializing, light poles, and very late hours (the hours proposed at the time of Staff’s review were until 3:00 or 4:00 a.m.). Community-Based Planning Staff recommended a series of mitigation measures to improve compatibility (*id.* at 9):

1. Replace the existing thin, wooden fence separating the parking area from the adjacent properties with a solid masonry wall, at least six feet tall, extending from the beginning of the driveway along North Westland Drive to a point 150 feet into the shopping center property, to buffer the lower shopping center level.

2. Eliminate the parking spaces abutting the two closest residential properties and increase the existing five-foot buffer strip to 12 feet. Use this 12-foot buffer area to plant large evergreen trees, tall enough to provide a visual screen for the special exception area, as well as ornamental shrubs.

3. Increase the grass buffer strip separating the restaurant’s pass-by and drive-through lanes from the sidewalk along North Westland Drive from three feet to ten feet. Retain the proposed trees.

4. Reduce operating hours for the drive-through window to 11:30 p.m.

One of the central difficulties Petitioner has faced in this case is that the limits of the lease area – the only part of the site it controls – do not include the buffer area between the parking lot and the abutting residences. Petitioner managed to extract from the landlord an agreement to replace the dilapidated fence that currently sits on the property line with a properly installed, solid wood fence, and to allow Taco Bell to plant a row of evergreens along the fence to buffer the first two homes. However, the more extensive buffering recommended by Community-Based Planning Staff was not discussed at the hearing and has not been proffered. Similarly, the recommendation for a wider buffer along the North Westland Drive sidewalk was neither discussed nor proffered. (The issue of operating hours will be discussed in the next section.) The Hearing Examiner notes that Community-Based Planning's recommendations are reproduced in the Staff Report, but are not included in the recommended conditions of approval.

### ***C. Proposed Use***

Taco Bell proposes to construct and operate a quick-service (fast-food) restaurant with a combination of Taco Bell, serving Mexican food, and Long John Silver's, serving mostly seafood. The new building would measure approximately 2,924 square feet, made up of 1,373 square feet of patron area and 1,551 square feet of food preparation and storage areas. As noted earlier, it would be located on the site of an existing one-story building. The one-story portion of the proposed building would be 18.5 feet in height to the roofline, and the one-and-a-half-story portion would be 23.5 feet high, both well under the 42-foot/three story maximum height in the C-2 Zone. The standard Taco Bell/Long John Silver building has a stucco exterior, but in this case, Taco Bell proposes a brick façade to match the surrounding area. The site plan also provides for a dumpster and mechanical facilities for the building, both to be screened by fencing and landscaping. Air filter and ventilation systems described as "state of the art" would be used to control food odors.

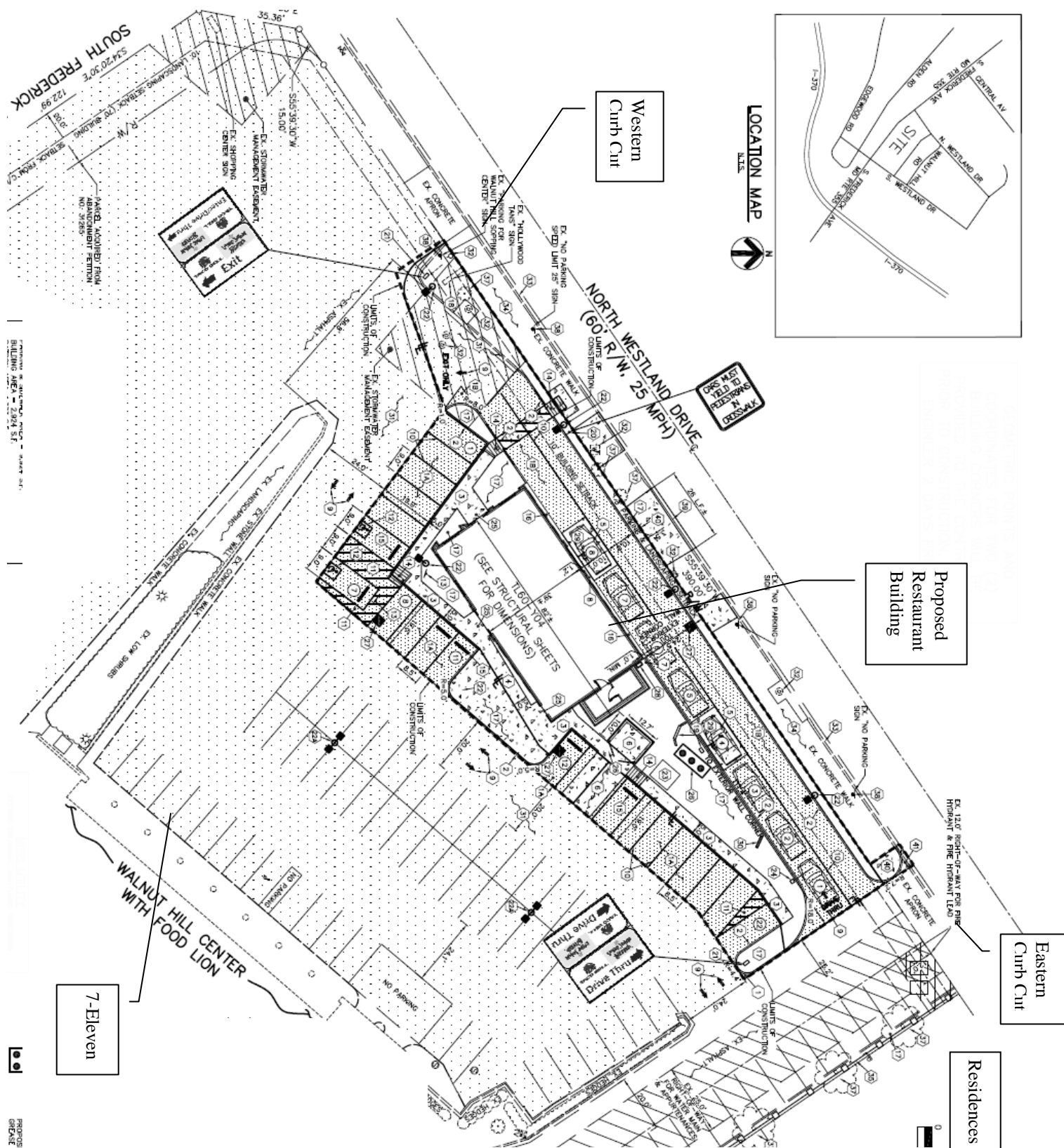
The drive-through lane would be located along the northern side of the building, would be 10 feet wide and 215 feet long, and would accommodate eight cars. Right next to the drive-through lane, the site plan shows an "escape lane" – a way for a driver who decides not to order any food to

leave the site quickly. To speed up the drive-through process, Taco Bell proposes a double window at this location. This means that during busy periods, instead of having all transactions between Taco Bell employee and customer take place at a single window, the customer would place an order, then drive to the first window, where he or she would pay for the food and receive a receipt, as well as items such as straws, napkins and condiments. At the second window, the employee would hand out the food. It is Taco Bell's experience that this increases employee efficiency and reduces the amount of time customers spend in line. Speed is one of the hallmarks of Taco Bell's service: the company goal for the amount of time between placing an order and receiving food is just three and a half minutes.

The subject site currently has three curb cuts along North Westland Drive. As shown on the site plan on the next page, this development would eliminate the middle one of the three, which Petitioner believes would enhance the general safety of the area. Signage on North Westland Drive would direct customers to enter the site via the western curb cut (the entrance closest to Rte. 355). Additional signs on site (both free-standing and painted on the ground) would direct customers to drive through the parking area, where they would be able to choose between parking and walking into the restaurant, or using the drive-through service. To reach the drive-through lane, a customer would enter the site, take an immediate left in front of the landscaped island that separates the upper and lower parking lots, then take a quick right and left to get to the parking lot drive aisle. At the end of that drive aisle, the customer would make two more lefts to get into the drive-through lane.

The Hearing Examiner queried whether customers who become familiar with the site would stop going through the parking lot, and would instead drive past the western curb cut to enter at the east end of the site, where two right turns would place them in the drive-through lane. Petitioner's traffic expert, Carl Starkey, opined that most customers would continue to go through the parking lot, because that is standard in these situations. He noted that although the maneuver looks a bit complicated on paper, it is easier than it looks. Mr. Starkey also observed that no matter which driveway customers use, they would still enter the site before reaching the residential neighborhood. Tr. Jan. 13 at 173.

**Site Plan, Ex. 60(a), graphics only**  
**(See following pages for notes, development standards table and legend)**



# Site Plan Legend, from Ex. 60(a)

<b>LEGEND</b>	
	CENTERLINE
	PROPERTY LINE
	LEASE LINE
	RIGHT-OF-WAY
	EXISTING CURB & GUTTER
	PROPOSED WOODEN FENCE
	EXISTING TREE
	EXISTING UTILITY POLE & GUY WIRE
	EXISTING LIGHT POLE
	EXISTING STORM SEWER INLET
	EXISTING SANITARY SEWER MANHOLE
	EXISTING CABLE PEDESTAL
	EXISTING WATER METER
	BENCHMARK LOCATION
	PROPOSED CURB
	PROPOSED LIGHT POLE
	PROPOSED CATCH BASIN
	PROPOSED EXTERIOR GREASE INTERCEPTOR
	PROPOSED SIGN
	PROPOSED CONCRETE
	EXISTING ASPHALT
	PROPOSED ASPHALT
	CONSTRUCTION NOTE
	PROPOSED PARKING SPACE NUMBER
	PROPOSED DRIVE THRU STACK CAR AND NUMBER
	EASEMENT LIMITS
	LIMITS OF CONSTRUCTION

**Site Plan Notes and Tables, from Ex. 60(a) (continued on next page)**

<b>ZONING NOTES</b>		
1. PROPERTY IS ZONED C-2, COMMERCIAL.		
2. LIMITS OF CONSTRUCTION AREA 18,356 S.F. (0.42 ACRES).		
PARKING & SIDEWALK AREA = 9,924 S.F.		
BUILDING AREA = 2,924 S.F.		
PATRON AREA=1,373 S.F.		
LANDSCAPE AREA = 5,508 S.F.		
3. DISTURBANCE AREA CONSISTS OF 9,928 S.F. (0.23 ACRES).		
4. HEIGHT OF BUILDING IS 18'-8 1/2" TO TOP OF PARAPET (23'-6" TO TOP OF TOWER)		
5. BUILDING SETBACKS		
	REQUIRED	PROVIDED
S. FREDERICK ROAD	70' (FROM C/L)	178.2'
N. WESTLAND DRIVE	10' (FROM R/W)	24.5'
SIDE (SE)	0'	N/A
REAR (NE)	0'	N/A
6. PARKING & LANDSCAPING SETBACKS		
	REQUIRED	PROVIDED
S. FREDERICK ROAD	10'	EX. SHOP. PLAZA
N. WESTLAND DRIVE	3'	3.0'
SIDE (SE)	0'	N/A
REAR (NE)	0'	N/A

**SITE PLAN NOTES**

1. PRIOR TO STARTING CONSTRUCTION THE CONTRACTOR SHALL BE RESPONSIBLE TO MAKE SURE THAT ALL REQUIRED PERMITS AND APPROVALS HAVE BEEN OBTAINED. NO CONSTRUCTION OR FABRICATION SHALL BEGIN UNTIL THE CONTRACTOR HAS RECEIVED AND THOROUGHLY REVIEWED ALL PLANS AND OTHER DOCUMENTS APPROVED BY ALL OF THE PERMITTING AUTHORITIES.
2. ALL WORK SHALL BE PERFORMED IN ACCORDANCE WITH THESE PLANS, SPECIFICATIONS AND THE REQUIREMENTS AND STANDARDS OF THE LOCAL GOVERNING AUTHORITY. THE SOILS REPORT AND RECOMMENDATIONS PREPARED BY PSI (PROJECT NO. 861-45170, DATED JANUARY 4, 2005) SET FORTH THEREIN ARE A PART OF THE REQUIRED CONSTRUCTION DOCUMENTS AND TAKE PRECEDENCE UNLESS SPECIFICALLY NOTED OTHERWISE ON THE PLANS. THE CONTRACTOR SHALL NOTIFY THE CONSTRUCTION MANAGER OF ANY DISCREPANCY BETWEEN SOILS REPORT & PLANS ETC.
3. DEMOLITION/SITE CLEARING: SEE CIVIL DWG'S AND GEOTECHNICAL REPORT FOR EXTENT OF SITE DEMOLITION. THIS WORK SHALL INCLUDE REMOVAL OF ALL EXISTING PAVEMENTS, CURBS (U.O.N.), LIGHT POLES (INCLUDING FTG'S.) VEGETATION (INCLUDING STUMPS), UTILITIES (NOT OTHERWISE REUSED), ETC. AS REQUIRED FOR NEW CONSTRUCTION.
4. SITE GRADING SHALL BE PERFORMED IN ACCORDANCE WITH THESE PLANS AND SPECIFICATIONS AND THE RECOMMENDATIONS SET FORTH IN THE SOILS REPORT REFERENCED IN THIS PLAN SET. THE CONTRACTOR SHALL BE RESPONSIBLE FOR REMOVING & REPLACING ALL SOFT, YIELDING OR UNSUITABLE MATERIALS AND REPLACING WITH SUITABLE MATERIALS AS SPECIFIED IN THE SOILS REPORT. ALL EXCAVATED OR FILLED AREAS SHALL BE COMPACTED AND MOISTURE CONDITIONED AS SPECIFIED IN THE SOILS REPORT. CONTRACTOR SHALL SUBMIT A COMPACTION REPORT PREPARED BY A QUALIFIED SOILS ENGINEER, REGISTERED WITHIN THE STATE WHERE THE WORK IS PERFORMED, VERIFYING THAT ALL FILLED AREAS AND SUBGRADE AREAS WITHIN THE BUILDING PAD AREA AND AREAS TO BE PAVED HAVE BEEN COMPACTED IN ACCORDANCE WITH THESE PLANS AND SPECS, AND THE RECOMMENDATIONS SET FORTH IN THE SOILS REPORT.
5. THE A.L.T.A. SURVEY SHALL BE CONSIDERED A PART OF THESE PLANS. THE G.C. IS RESPONSIBLE FOR LOCATING IMPROVEMENTS PER THESE PLANS.
6. THE LOCATIONS OF UNDERGROUND FACILITIES SHOWN ON THESE PLANS ARE BASED ON FIELD SURVEYS AND LOCAL UTILITY COMPANY RECORDS. IT SHALL BE THE CONTRACTORS FULL RESPONSIBILITY TO CONTACT THE APPROPRIATE UTILITY COMPANY. NO COMPENSATION SHALL BE PAID TO THE CONTRACTOR FOR DAMAGE AND REPAIR TO THESE FACILITIES CAUSED BY HIS WORK FORCE.
7. ALL DIMENSIONS AND GRADES SHOWN ON THE PLANS SHALL BE FIELD VERIFIED BY THE CONTRACTOR PRIOR TO CONSTRUCTION. CONTRACTOR SHALL NOTIFY THE CONSTRUCTION MANAGER IF ANY DISCREPANCIES EXIST PRIOR TO PROCEEDING WITH CONSTRUCTION, FOR NECESSARY PLAN OR GRADE CHANGES. NO EXTRA COMPENSATION SHALL BE PAID TO THE CONTRACTOR FOR WORK HAVING TO BE REDONE DUE TO DIMENSIONS OR GRADES SHOWN INCORRECTLY ON THESE PLANS IF SUCH NOTIFICATION HAS NOT BEEN GIVEN.
8. UPON RECEIPT OF POINT COORDINATE DATA, THE CONTRACTOR SHALL RUN AN INDEPENDENT VERTICAL CONTROL TRAVERSE TO CHECK BENCHMARKS AND A HORIZONTAL CONTROL TRAVERSE THROUGH GIVEN POINTS TO CONFIRM GEOMETRIC DATA AND SUBMIT TO THE ENGINEER PRIOR TO ANY CONSTRUCTION.
9. ALL DIMENSIONS ARE GIVEN TO FACE OF CURB UNLESS OTHERWISE NOTED.
10. ACCESS THROUGHOUT THE SHOPPING CENTER SHALL REMAIN OPEN AT ALL TIMES. CONTRACTOR SHALL PROVIDE ADEQUATE MAINTENANCE OF TRAFFIC PLAN. CONTRACTOR SHALL COORDINATE SCHEDULE WITH CONSTRUCTION MANAGER.



## CONSTRUCTION NOTES

- 1A) PROPOSED ASPHALT PAVEMENT AS SPECIFIED:  
NOTE: SOILS REPORT GOVERNS IF ANY DISCREPANCIES OCCUR.
- | MATERIAL                 | DEPTH | DOT SPECIFICATIONS ITEM |
|--------------------------|-------|-------------------------|
| A.C. SURFACE COURSE      | 1.5"  | HMA-SUPERPAVE-9.5MM     |
| A.C. INTERMEDIATE COURSE | 2.5"  | HMA-SUPERPAVE-25MM      |
| AGG. BASE COURSE         | 6"    | CR-6 OR EQUIVALENT      |
| SUBGRADE COMPACTION      | 12"   | PER SOILS REPORT        |
- APPLY LIQUID ASPHALT AT ALL JOINTS BETWEEN CONCRETE AND ASPHALT. SEE TYPICAL SECTION, DETAIL 1, SHEET C2.1. MATCH EXISTING PAVEMENT ELEVATIONS, ENSURING POSITIVE DRAINAGE.
- 1B) PROPOSED ASPHALT PAVEMENT AS SPECIFIED:  
NOTE: SOILS REPORT GOVERNS IF ANY DISCREPANCIES OCCUR.
- | MATERIAL                 | DEPTH | DOT SPECIFICATIONS ITEM |
|--------------------------|-------|-------------------------|
| A.C. SURFACE COURSE      | 1.5"  | HMA-SUPERPAVE-9.5MM     |
| A.C. INTERMEDIATE COURSE | 3"    | HMA-SUPERPAVE-25MM      |
| AGG. BASE COURSE         | 8"    | CR-6 OR EQUIVALENT      |
| SUBGRADE COMPACTION      | 12"   | PER SOILS REPORT        |
- APPLY LIQUID ASPHALT AT ALL JOINTS BETWEEN CONCRETE AND ASPHALT. SEE TYPICAL SECTION, DETAIL 1, SHEET C2.1. MATCH EXISTING PAVEMENT ELEVATIONS, ENSURING POSITIVE DRAINAGE.
- 2) PROPOSED CURB PER DETAIL 2, SHEET C2.1.
- 3) PROPOSED P.C.C. CURBED WALK PER DETAIL 3, SHEET C2.1.
- 4) PROPOSED P.C.C. WALK PER DETAIL 4, SHEET C2.1.
- 5) PROPOSED 8" P.C.C. PAVEMENT W/ W.W.F. 6" x 6"-W2.9 x W2.9 (CONTROL JTS. 12'-0" O.C.) OVER 6" CRUSHED AGGREGATE OR GRAVEL BASE. APPLY LIQUID ASPHALT AT ALL JOINTS BETWEEN CONCRETE AND ASPHALT.
- 6) PROPOSED BRICK DUMPSTER ENCLOSURE TO MATCH BUILDING AND P.C.C. PAVEMENT PER DETAIL 8, SHEET C2.1.
- 7) PROPOSED BOLLARD PER DETAIL 15, SHEET C2.2.
- 8) PROPOSED BOLLARD AT CURB PER DETAIL 16, SHEET C2.2.
- 9) PROPOSED PAVEMENT MARKINGS - WHITE ON ASPHALT, YELLOW ON CONCRETE - PER DETAIL 14, SHEET C2.2.
- 10) PROPOSED PAINTED 4" WIDE SOLID STRIPE - WHITE ON ASPHALT, YELLOW ON CONCRETE.
- 11) PROPOSED PAINTED TRANSVERSE STRIPING PER DETAIL 13, SHEET C2.1.
- 12) PROPOSED PAINTED INTERNATIONAL HANDICAP SYMBOL PER ADA SPECIFICATIONS AND DETAIL 4, SHEET C2.2.
- 13) PROPOSED HANDICAP PARKING SIGN PER DETAIL 14, SHEET C2.1.
- 14) PROPOSED HANDICAP ACCESSIBLE RAMP PER ADA SPECIFICATIONS AND DETAIL 4, SHEET C2.2.
- 15) PROPOSED P.C.C. WHEELSTOP PER DETAIL 15, SHEET C2.1.
- 16) PROPOSED CURB AT DRIVE THRU PER DETAIL 16, SHEET C2.1.
- 17) PROPOSED LANDSCAPING AREA. SOD ALL DISTURBED AREAS EXCEPT WHERE PLANTING BEDS ARE INDICATED. SEE SHEET L1.0.
- 18) EXISTING 5'-0" O.A.H., 26.67 S.F. (INCLUDING BASE) MONUMENT SIGN TO BE REFACED. CONTRACTOR SHALL PROTECT THE BASE AND FOUNDATION DURING CONSTRUCTION.
- 19) PROPOSED MENU BOARD AND SPEAKER PEDESTAL PER SIGN SUPPLIER SPECIFICATIONS. SIGN SUPPLIER TO PROVIDE A TEMPLATE FOR G.C. G.C. TO COORDINATE A MEETING WITH THE CONSTRUCTION MANAGER AND OPERATIONS TO VERIFY LOCATION AND PLACEMENT OF MENU BOARD AND SPEAKER PRIOR TO ANY CONSTRUCTION. CONTRACTOR SHALL INSTALL FOUNDATIONS FOR SPEAKER PEDESTAL AND MENU BOARD PER DETAIL 13, SHEET C2.2.
- 20) PROPOSED "CARS MUST YIELD TO PEDESTRIANS IN CROSSWALK" SIGN.
- 21) PROPOSED DIRECTIONAL SIGN PER SIGN SUPPLIER SPECIFICATIONS. CONTRACTOR SHALL INSTALL FOUNDATION PER SIGN SUPPLIER DESIGN. SIGN FACES AS NOTED ON THIS SHEET.
- 22) PROPOSED LIGHT POLE AND FOUNDATION OVERALL HEIGHT IS 14' INCLUDING BASE PER DETAIL 20, SHEET C2.1 AND SHEET E1.0.
- 22A) PROPOSED LIGHT POLE AND FOUNDATION OVERALL HEIGHT IS 18' INCLUDING BASE.
- 23) ELECTRICAL TRANSFORMER PAD BY LANDLORD.
- 24) PROPOSED AWNING CLEARANCE BAR PER DETAIL 18, SHEET C2.1.
- 25) PROPOSED FROST SLAB AT DOOR. SEE STRUCTURAL DRAWINGS.
- 26) PROPOSED 1,600 GALLON EXTERIOR GREASE INTERCEPTOR PER DETAIL 14, SHEET C4.1.
- 27) PROPOSED CATCH BASIN PER DOT SPECIFICATIONS AND DETAIL 5, SHEET C4.1.
- 28) PROPOSED GAS METER PER GAS COMPANY SPECIFICATIONS. SEE ARCHITECTURAL DRAWINGS FOR EXACT LOCATION.
- 29) PROPOSED SENSOR LOOP.
- 30) PROPOSED PREVIEW BOARD PER SIGN SUPPLIER SPECIFICATIONS.
- 31) EXISTING ASPHALT TO REMAIN AND BE PROTECTED DURING CONSTRUCTION.
- 32) EXISTING UTILITIES TO REMAIN AND BE PROTECTED DURING CONSTRUCTION.
- 33) EXISTING CURB/CURB & GUTTER TO REMAIN AND BE PROTECTED DURING CONSTRUCTION.
- 34) EXISTING CONCRETE TO REMAIN AND BE PROTECTED DURING CONSTRUCTION.
- 35) EXISTING WOODEN FENCE TO BE REPLACED BY THE LANDLORD. NEW FENCE TO BE A WOODEN FENCE 6'-6" O.A.H.
- 36) NOT USED
- 37) EXISTING TREE TO REMAIN AND BE PROTECTED DURING CONSTRUCTION.
- 38) EXISTING SIGNAGE TO REMAIN AND BE PROTECTED DURING CONSTRUCTION.
- 39) PROPOSED CURB & GUTTER TO MATCH EXISTING IN TYPE AND ELEVATION, ENSURING POSITIVE DRAINAGE.
- 40) PROPOSED CONCRETE WALK TO MATCH EXISTING IN TYPE AND ELEVATION, ENSURING POSITIVE DRAINAGE.
- 41) PROPOSED CONCRETE APRON AND GUTTER TO MATCH EXISTING.

Testimony from the manager of the 27 corporate-owned Taco Bell restaurants in the Baltimore/Washington/Northern Virginia area, Mike Lubin, indicated that at the very busiest times, he would not expect more than ten cars to be waiting in line (which would mean, at this location, two cars waiting in the drive aisles, or perhaps one in a drive aisle and one on North Westland Drive). He stressed that if cars do get that backed up, it means he does not have the right manager and employees at that site. Transportation Planning Staff at the MNCPPC observed that the drive-through lane proposed here is longer than the typical fast-food drive-through aisle. See Staff Report at 3. Staff found the length of the drive-through lane adequate, noting that the number of cars in line at a drive-through window tends to be limited by motorists' perception of when the line becomes so long that the convenience of staying in their vehicles is not worth the extra time in line; then it becomes more convenient to park and walk into the restaurant. See *id.*

The ordering process at the proposed site would involve a menu board and a speaker, where a Taco Bell employee greets the customer and takes the order. The site plan also provides for an "order confirmation board," which is featured at newer Taco Bell locations. This board displays all the items the customer has ordered, so instead of going through the order verbally, the employee can simply ask the customer to confirm whether everything shown on the screen is correct. Taco Bell explains that this system reduces the amount of talking the employees have to do, thereby reducing the amount of noise generated. Taco Bell's site planner, Kira Kabo, testified that the sound coming out of the speaker box would not travel far enough to reach even the street, let alone the neighboring houses. She opined that sound emitted from the speaker box would travel in a band about three to five feet wide, going out a distance of about 30 to 35 feet. Accordingly, the sound would die off before reaching the sidewalk. She based this opinion on the standards for the unit and testing of the unit, which they have done because they have had some issues with sites around the country. With the unit proposed here, even the car right behind the car placing an order would not be able to hear what the Taco Bell employees are saying. Tr. Jan. 13 at 86.

Taco Bell is proposing less signage at this location than it normally uses, for compatibility purposes. As shown on the building elevation illustrations on the next page, Taco Bell and Long John Silver signs are proposed on the side facing the shopping center and both roadways, but no signs are proposed for the side of the building that would face the Walnut Hill residential neighborhood. All but one of the proposed signs would meet the requirements of the county sign ordinance. Only one sign is permitted by right for each customer entrance, so Petitioner would need a sign variance to post both a Taco Bell sign and a Long John Silver's sign at the front entrance.

The elevations shown below suggest that two decorative elements of the front façade that rise above the roofline would be visible from below nearby residences -- an arch above the Taco Bell side of the building, and a tower atop the Long John Silver side. The arch would be about 25 high, 7 feet higher than the building (building height is measured to the top of the parapet). The tower would be about 28 feet high, ten feet taller than the building. Tr. Jan. 13 at 96-97. Ms. Kabo testified, however, that because of the 150-foot distance between the building and the residential area, only the parapet would be visible, not the decorative arch or the tower. Tr. Jan. 13 at 55-56. The signs would be illuminated, but the arch and the tower would not be. *Id.* at 54-55.

**Building Elevation Facing Rte. 355, Ex. 62 top left**



**Building Elevation Facing 7-Eleven, Ex. 62 top right**



**Building Elevation Facing North Westland Drive, Ex. 62 lower left**



**Building Elevation Facing Walnut Hill Residential Neighborhood**



One of the most contentious elements of this petition is the proposed hours of operation. Up until the public hearing, Taco Bell was proposing operating hours for the drive-through of 10:00 a.m. to 3:00 a.m. Sunday through Thursday, and 10:00 a.m. to 4:00 a.m. on Friday and Saturday, with the dining room closing at 11:00 p.m. Sunday through Thursday, and midnight on Friday and Saturday. Technical Staff recommended that the hours of operation be limited to 10:00 a.m. to 11:30 p.m. Sunday through Thursday, and 10:00 a.m. to 12:30 a.m. on Friday and Saturday. See Staff Report at 2. This recommendation was based on the proximity of the nearest residences and the expected cumulative impact of a 24-hour 7-Eleven store combined with a late-night Taco Bell restaurant. See Staff Report at 19; text quoted at length on page 81 of this report. During the public hearing, Mr. Lubin represented that Taco Bell would be willing to scale back the hours of operation for the drive-through to 10:00 a.m. to 2:00 a.m., seven days a week (the dining room hours would remain as originally proposed). When asked specifically, by the Hearing Examiner, whether Taco Bell would be willing to reduce the hours to the level recommended by Technical Staff, Mr. Lubin stated that he could not agree to that, for competitive reasons. He stated that the trend in the quick service industry is towards late night and even 24-hour operations, and 2:00 a.m. is the earliest time he can commit to and still be able to compete.

Taco Bell proposes no more than ten employees on site at one time, plus a manager. Mr. Lubin anticipates that the proposed restaurant would have the full contingent during the lunch peak (11:00 a.m. to 2:00 p.m.) and the dinner peak (5:00 to 8:00 p.m.). During non-peak periods there would be four to six employees on site, plus a manager, and by the time they get to closing he would expect to need only three employees plus a manager. Mr. Lubin added that during the first few weeks of operation, he would need a larger number of employees at one time, perhaps on the order of 15, until demand dies down from the opening rush to a normal level.

Mr. Lubin described the policy of Taco Bell and its parent company, Yum! Brands, about patrolling the grounds to maintain a clean environment. He stated that there are four components to the cleaning program, a major element of which is "manager walks." A manager is required to walk the

inside and outside of the facility every 30 minutes, all day, walking the perimeter of the building and making sure that Taco Bell trash is not making its way into the general neighborhood. This would include, for example, picking up a cup that is closer to the 7-Eleven than to the Taco Bell.

With regard to loitering, Mr. Lubin described two approaches. The first is to communicate the company's expectations to customers. If there is a lot of loitering outside a restaurant that can't be controlled at the store level, Taco Bell will work with the police. They also find that piping low-level classical music outside the store tends to deter kids from hanging out there. Based on his experience, Mr. Lubin does not expect a problem with loitering at the proposed location, if the store is approved. He stated that typically, loitering is a problem where there is a bar nearby, and people leave the bar and hang out in the Taco Bell parking lot.

Mr. Lubin described the safety of customers and employees as the number one focus of Taco Bell and Yum! Brands. Security measures include not letting people enter and exit the building through the back door. The only thing that comes through the back door is restaurant deliveries. After dark, the back door does not open for any reason. In addition, no employee is ever in the building alone. There is always at least one manager and one employee. Also, once the dining room doors are locked at night, no one can enter or leave the building except at the beginning or end of a specific shift.

Taco Bell restaurants receive their supplies from a single source, on tractor-trailers that arrive two to three times per week, depending on each store's volume. Mr. Lubin agreed, at the request of community members participating in the hearing, to limit delivery times to weekday mornings, with trucks to arrive no earlier than 8:00 a.m. and no later than 10:00 a.m. Tr. Jan. 25 at 13-14. He also provided assurances that if the proposed special exception is approved, Taco Bell delivery trucks will not travel through the neighborhood. Tr. Jan. 25 at 8-9. Mr. Lubin anticipates that the dumpster would be emptied two to three times per week.

### ***D. Parking***

Based on 1,373 square feet of patron area, the Zoning Ordinance would require a minimum of 35 parking spaces for the proposed use (25 spaces for every 1,000 square feet of floor area for patron use). See Staff Report at 5, citing Code § 59-E-3.7. As noted earlier, the leased area proposed to be subject to the requested special exception does not contain any parking spaces, because all of the shopping center parking spaces are shared among the various tenants. There are, however, approximately 77 parking spaces in the lower level parking area, between the subject site and the 7-Eleven. Tr. Jan. 13 at 167-68; Ex. 42(b). Based on a parking accumulation study prepared by Petitioner's traffic expert, the peak parking demand in the lower level lot currently is 35 spaces, in the middle of the day on Saturday, with 80 to 90 percent of cars staying less than 30 minutes.<sup>3</sup> See Ex. 23(d). Subtracting the 35 spaces currently used at peak demand from the 77 spaces available in the lower parking lot leaves 42 spaces, more than enough to satisfy the requirement for 35 spaces.

In addition to the spaces available in the lower parking lot, Petitioner's lease for the subject site includes the non-exclusive right to use all common areas of the shopping center, including all parking areas. See Ex. 61. The landlord reports that as of April, 2005, the amount of space in the shopping center devoted to retail space, office space, restaurant patron area, furniture store and auto repair requires approximately 617 parking spaces; 649 are provided. See Staff Report at 6. (The Staff Report erroneously reports that there are over 300 parking spaces available in the vicinity of the subject site; testimony and pictorial evidence establish that the number is about 77.)

### ***E. Landscaping, Lighting and Signage***

The subject site currently has almost no landscaping – just a few trees along North Westland Drive that, by all accounts, do not present an attractive view. Petitioner proposes to devote approximately 30 percent of the subject site to green space, which is significantly more than the

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<sup>3</sup> The parking accumulation study was based on manual counts of parked cars at five minute intervals, with license plate numbers recorded to assess turnover. See Ex. 23(d). Observations were made on Friday, July 8, 2005 between 4:00 and 7:00 p.m. and on Saturday, July 9, 2005 between 11:00 a.m. and 2:00 p.m. *Id.*

required ten percent. See Staff Report at 14. Landscaping would include a three-foot strip of grass along North Westland Drive with trees spaced approximately 50 feet apart,<sup>4</sup> plus additional grassy areas, shrubs and trees in clusters around the building and along the drive-through lane. As noted earlier, at the public hearing Petitioner added to its proposal a row of evergreens to be planted along the fence between the parking lot and the adjacent homes, between the existing deciduous trees. They are intended to be a minimum of five feet tall at planting, reaching two feet in diameter and 15 feet in height at maturity. Depending on the species (which Petitioner proposes to work out with Technical Staff), Ms. Kabo estimated two to four years to maturity.

The plan for additional evergreens was clearly put together in haste, in an effort to blunt the edge of community members' opposition, because it did not take into account two existing features in that part of the parking lot, which were pointed out by community member Doug Hill. There is a large dumpster in that corner of the parking lot, as well as a fire plug that would have to be protected from overgrowth of the new plantings. See Tr. Jan. 13 at 109-110. Petitioner did not say whether the landlord had agreed to move the dumpster, and Petitioner's land planner was obviously surprised to hear that there was a fire plug in that location.

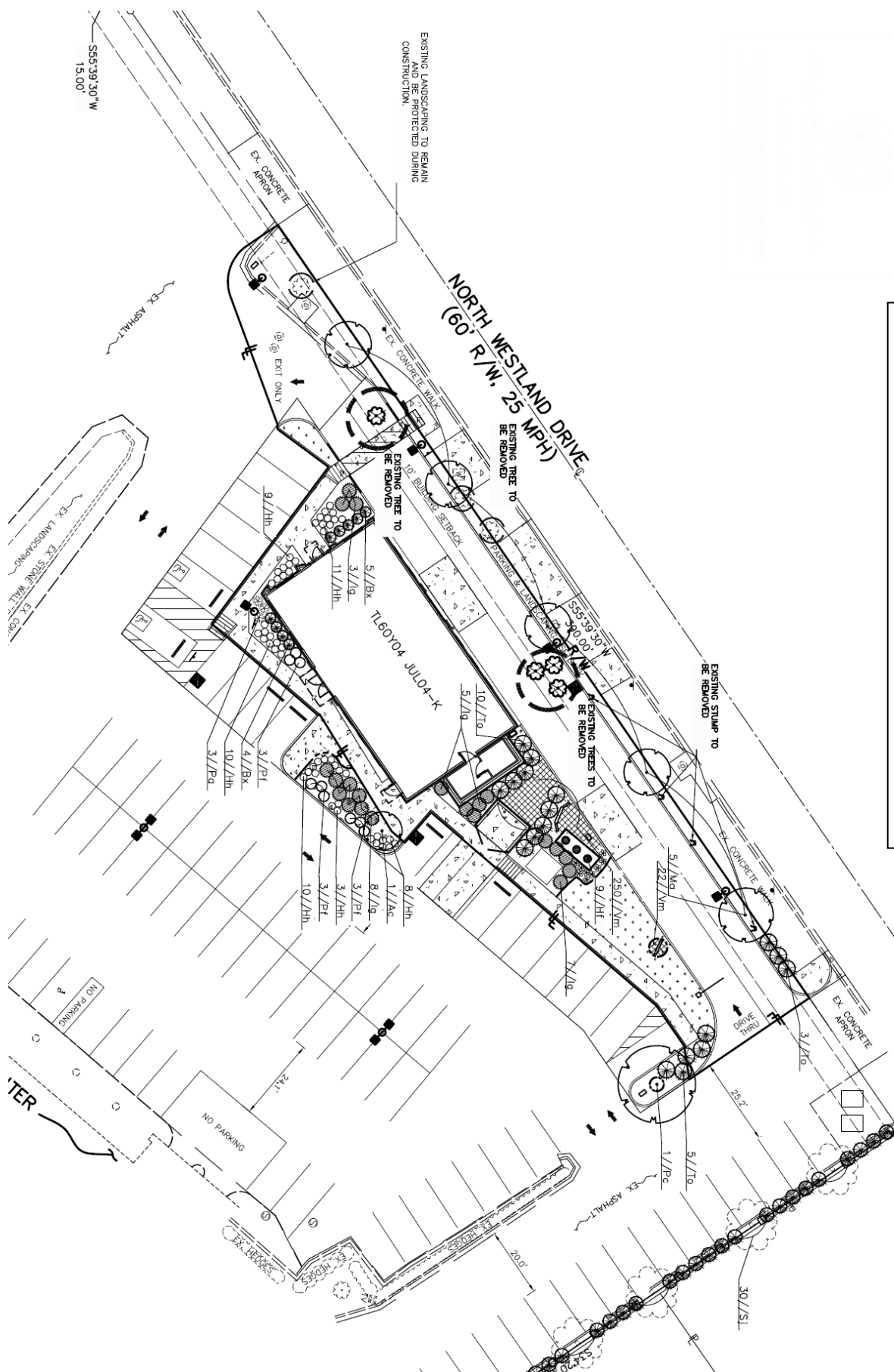
The components of the Landscape Plan are shown on the next two pages, followed by photo simulations of the newly-proposed buffer plantings.

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<sup>4</sup> The 50-foot spacing figure is based on the distance the Hearing Examiner scaled off on the Landscape Plan, Ex. 60(b). The Hearing Examiner first tried to scale off this distance on a composite site plan/landscape plan, Ex. 39, but discovered that the scale was marked incorrectly; Exhibit 39 states that is at a scale of 1/8 in. = 1 foot, but in reality it appears to be at a scale of 1 inch = 20 feet.



**Landscape Plan, Ex. 60(b), graphics only  
Legend and Plant List on Next Page**



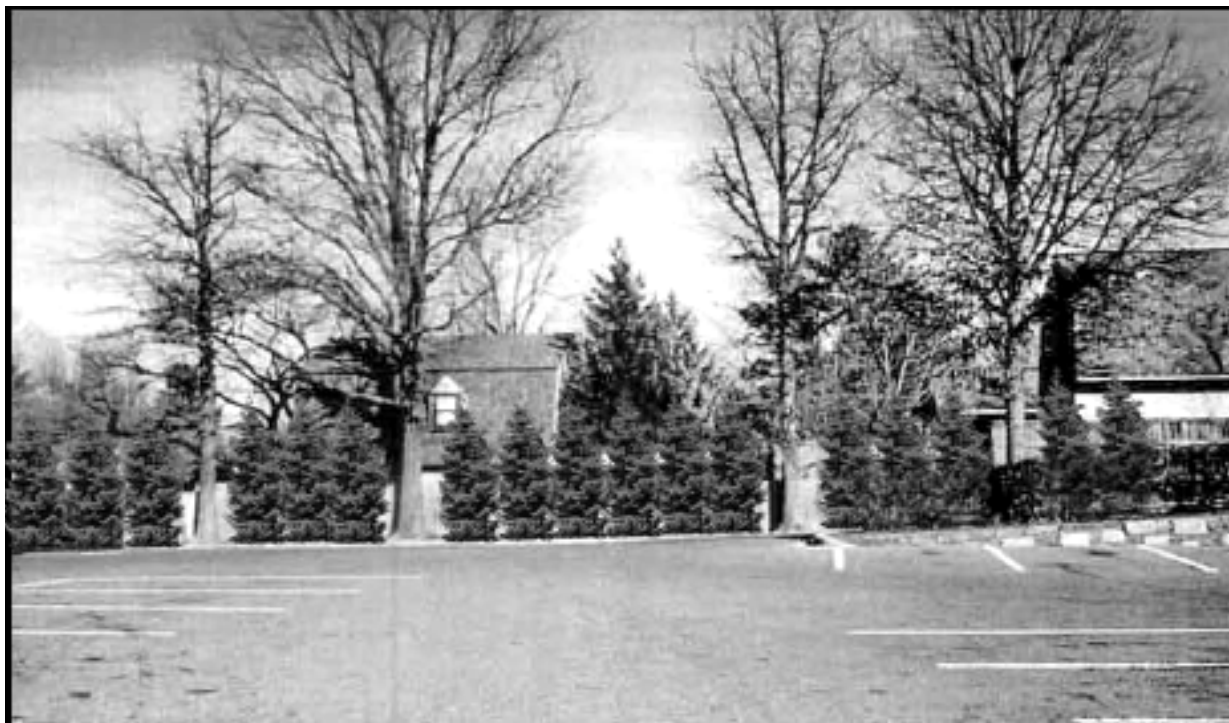
# PLANT LIST

Symbol	Botanical Name	Common Name	Qty.	Size	Condition	Remarks
Ac	Amelanchier canadensis	Shadblow Serviceberry	1	7' clump	B&B	Speciman
Bx	Buxus 'Green Velvet'	Green Velvet Boxwood	9	No. 2	Cont.	3' o/c
Hh	Hemerocallis Stella D'Oro	Stella D'Oro Daylily	51	No. 1	Cont.	18" o/c
Hf	Hosta fortunei 'Aureo-Marginata'	Aureo-Marginata Plantain Lily	9	No. 1	Cont.	2' o/c
Ig	Ilex glabra 'Nordic'	Nordic Inkberry	23	24"	B&B	4' o/c
Ma	Malus 'Spring Snow'	Spring Snow Crab	5	2" cal	B&B	Matched
Pa	Pennisetum alopecuroides 'Little Bunny'	Little Bunny Fountain Grass	3	No. 2	Cont.	2' o/c
Pc	Pyrus calleryana 'Cleveland Select'	Cleveland Select Callery Pear	1	2 1/2"	B&B	Speciman
Pf	Potentilla f. Abbotswood	Abbotswood Potentilla	9	No. 3	Cont.	3' o/c
Sj	Juniperus scopulorum 'Skyrocket'	Sky Rocket Juniper	30	No. 7	Cont.	2' o/c
To	Thuja occidentalis 'Techny'	Mission Arborvitae	18	5'	B&B	5' o/c
Vm	Vinca minor	Myrtle	272	2 1/4" peat pot		1' o/c

## LEGEND

	CENTERLINE
	PROPERTY LINE
	LEASE LINE
	RIGHT-OF-WAY
	EXISTING CURB & GUTTER
	PROPOSED WOODEN FENCE
	EXISTING TREE
	EXISTING UTILITY POLE & GUY WIRE
	EXISTING LIGHT POLE
	EXISTING STORM SEWER INLET
	EXISTING SANITARY SEWER MANHOLE
	EXISTING CABLE PEDESTAL
	EXISTING WATER METER
	BENCHMARK LOCATION
	PROPOSED CURB
	PROPOSED LIGHT POLE
	PROPOSED CATCH BASIN
	PROPOSED EXTERIOR GREASE INTERCEPTOR
	PROPOSED SIGN
	PROPOSED CONCRETE
	PLANT QUANTITY AND SYMBOL
	TRENCHED EDGE
	TREE/SHRUB
	SOD AREA
	GROUND COVER
	SEED AREA

**Photographic Simulation of Proposed Buffer Plantings  
Looking East Towards Residences, Ex. 42(a) top photo**



**Photographic Simulation of Proposed Buffer Plantings  
Looking South behind Shopping Center, Ex. 42(a) bottom photo**



The submitted lighting plan, which is called “Site Electrical and Photometric Plan,” Exhibit 60(c), is the product of extensive negotiation between Petitioner and Technical Staff. As Ms. Kabo described it, Technical Staff wanted Taco Bell to light the entire lower parking lot, for safety reasons, but at the same time, they wanted zero foot candles along the eastern property line and on North Westland Drive. The proposed lighting plan provides for two 18-foot light poles in the parking lot, each with two fully shielded light fixtures. It also shows a 14-foot light pole in the southwest corner of the special exception area, near the point where cars would enter the site from North Westland Drive, and four more along the edge of the escape lane, facing into the subject site. These light poles would each have one fully shielded light fixture. A total of eleven lights, in three styles, would be mounted on the three sides of the building facing the shopping center and roadways. In addition, the menu board, preview board, order confirmation board and signs would be lit internally.

The resulting photometrics would achieve the goals Technical Staff established: the lower parking lot would have at least low levels of lighting for all of the parking spaces and drive aisles, getting progressively lower as one approaches the adjoining residences, and the illumination would drop down to zero at the northern and eastern property lines, abutting North Westland Drive and the adjoining residences, respectively.<sup>5</sup> Technical Staff opined that the submitted lighting plan is “the best lighting plan for that development and special exception site and in terms of being non-intrusive”. Staff Report at 3.

Community members argued that other Taco Bell restaurants have brightly lit parking lots, suggesting that the same would be true here. This was based on nothing more than conjecture, and is not persuasive in the face of a professionally prepared photometric plan. The graphics portion of the lighting plan, Ex. 60(c), is reproduced on the next page, followed by depictions of each of the proposed lighting fixtures.

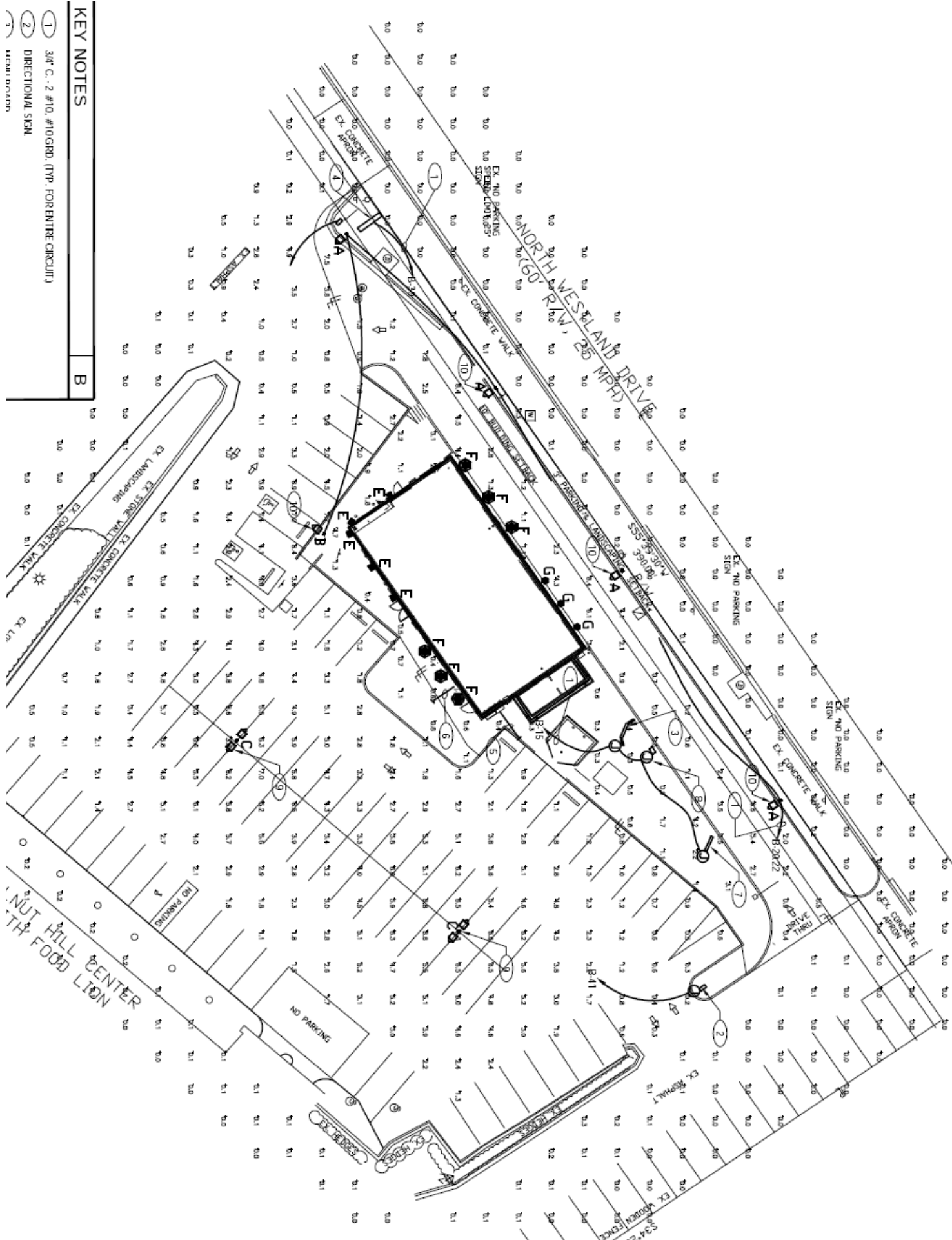
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<sup>5</sup> The Planning Board recommendation states that the lighting study is “unconvincing.” See Ex. 34. It is not obvious to the Hearing Examiner what this means – does the Planning Board suspect that the photometrics are incorrect, and the lighting levels would be higher than shown? Does it find that the lighting proposed would be excessive, or insufficient? The Hearing Examiner finds it difficult to place any weight on this element of the Planning Board’s recommendation, given its ambiguity.

## KEY NOTES

3/4" C. - 2 #10, #10 GRD. (TYP. FOR ENTIRE CIRCUIT.)

DIRECTIONAL SIGN.

**WELSH & BARNES**

**Lighting Plan Statistics and Luminaire Schedule, from Ex. 60(c)**

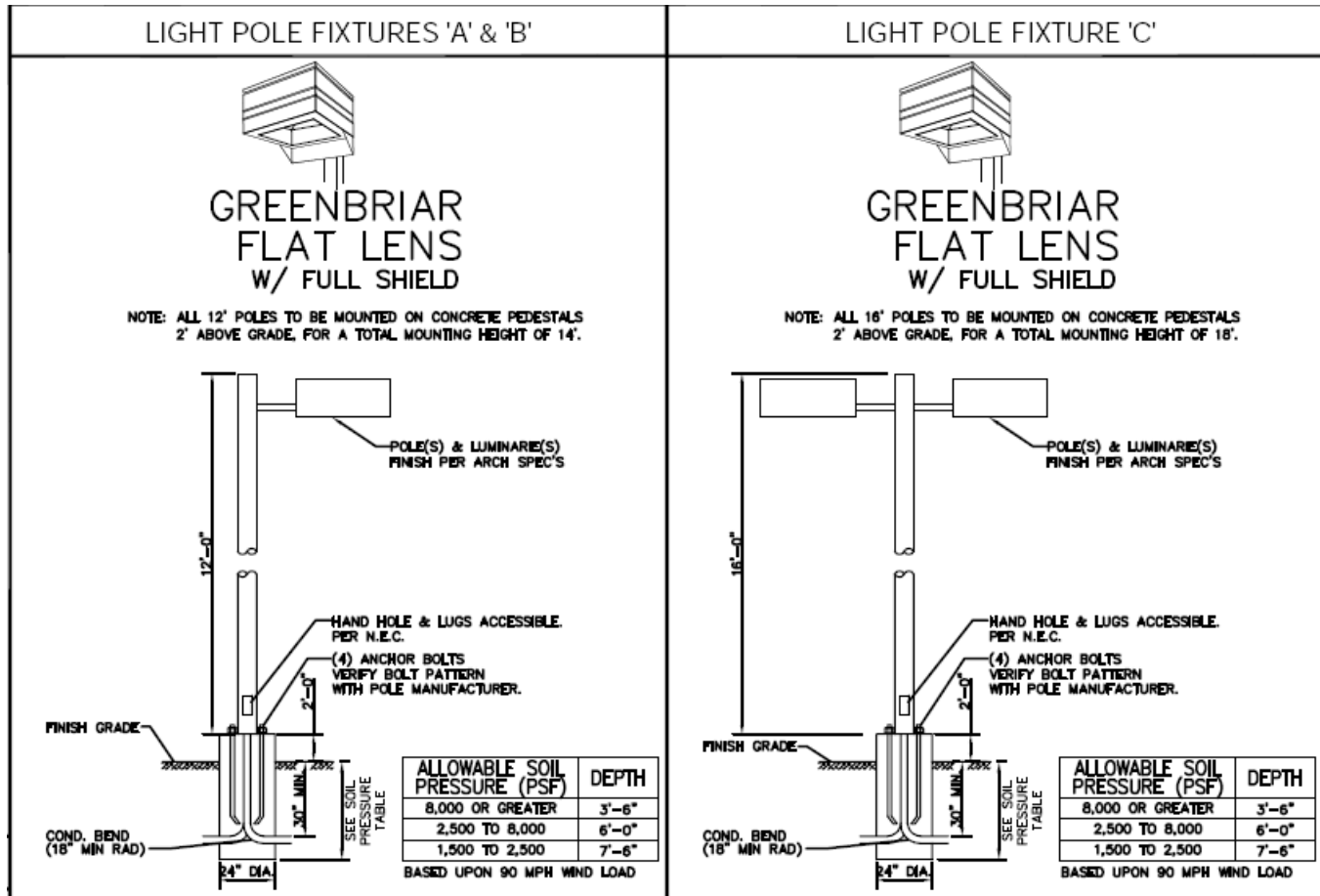
STATISTICS						
Description	Symbol	Avg	Max	Min	Max/Min	Avg/Min
Around Building	+	1.3 fc	4.7 fc	0.3 fc	15.7:1	4.3:1
Outside Parking Lot	+	0.1 fc	4.9 fc	0.0 fc	N / A	N / A
Parking Lot	+	3.1 fc	8.4 fc	0.2 fc	42.0:1	15.3:1

LUMINAIRE SCHEDULE										
Symbol	Label	Qty	Catalog Number	Description	Lamp	File	Lumens	LLF	Watts	
	A	4	GFM FP 250MHR HSS BRZ	GREENBRIAR MEDIUM	1- 250W CLEAR MHR BU (124)	GFM-FP-400- MHR-HSS.IES	20800	0.79	300	
	B	1	GFM FP 250 MHR F BRZ	GREENBRIAR MEDIUM	1- 250W CLEAR MHR BU (124)	GFM-FP-400- MHR-F.IES	20800	0.79	300	
	C	2	GFM 5 400 MHR F	GREENBRIAR MEDIUM	1- 400W CLEAR MHR BU	GFM-5-400- MHR-F.IES	36000	0.79	908	

**Key Notes from Ex. 60(c)**

KEY NOTES		B
<p>① 3/4" C. - 2 #10, #10 GRD. (TYP. FOR ENTIRE CIRCUIT.)</p> <p>② DIRECTIONAL SIGN.</p> <p>③ MENU BOARD.</p> <p>④ EXISTING PYLON SIGN.</p> <p>⑤ UNDERGROUND ELECTRIC SERVICE TO UTILITY CO. TRANSFORMER. REFER TO CIVIL SHEETS FOR LOCATION AND ROUTING. VERIFY AND COORDINATE ALL REQUIREMENTS WITH UTILITY CO.</p> <p>⑥ UNDERGROUND TELEPHONE SERVICE. REFER TO CIVIL SHEETS FOR LOCATION AND ROUTING. VERIFY AND COORDINATE ALL REQUIREMENTS WITH UTILITY CO.</p> <p>⑦ PREVIEW BOARD.</p> <p>⑧ ORDER CONFIRMATION BOARD/ SPEAKER POST.</p> <p>⑨ 18'-0" MOUNTING HEIGHT FROM BOTTOM OF FIXTURE TO TOP OF GRADE. 16'-0" POLE WITH 2'-0" BASE)</p> <p>⑩ 14'-0" MOUNTING HEIGHT FROM BOTTOM OF FIXTURE TO TOP OF GRADE. 12'-0" POLE WITH 2'-0" BASE)</p>		

## Lighting Fixtures, from Ex. 60(c)



## LIGHT POLE FIXTURES 'E'

**Yum Brands, INC**  
INTERIOR SPECIFICATION

**Decorative Lighting - E**

PROJECT:  
TL60-V04  
Anywhere, USA

**Accuserv**  
LIGHTING & EQUIPMENT  
3865 Produce Rd.  
Suite 206  
Louisville, KY 40219  
Toll Free: 877-707-7378  
Phone: 502-981-0066  
Fax: 502-981-0057  
Web: www.accu-serv.com

Type I

Item # **TB5201/CSF100M**

Classification: Custom Pepper-Spin Wall Sconce

Finish: Bronze Powdercoat

Lamp Type: 100 Watt MH

Location: Exterior E / PCN #: E52800389 / 96336

Leadtime: In Stock

Lamp Type: 100 Watt Clear Metal Halide

## LIGHT POLE FIXTURES 'F'

**YUM!**  
Exterior Specification

**Decorative Lighting - F**

PROJECT:  
YUM!  
Anywhere, USA

**Accuserv**  
LIGHTING & EQUIPMENT  
3865 Produce Rd.  
Suite 206  
Louisville, KY 40219  
Toll Free: 877-707-7378  
Phone: 502-981-0066  
Fax: 502-981-0057  
Web: www.accu-serv.com

Type M1

Item # **KF4217PNA**

Classification: Exterior Cocoonneck  
Please Note Fixture is (2) Pans

Dimensions: 20" Diameter

Finish: Polished Satin Aluminum


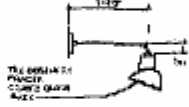


Lamp Type: 130 A =

Location: Exterior E / PCN #: TBD / TBD

Leadtime: In Stock

Lamp Type:

## Final Lighting Fixture, from Ex. 60(c)

LIGHT POLE FIXTURES 'G'		
Yum Brands!, INC INTERIOR SPECIFICATION		
Decorative Lighting - G		
PROJECT: 7L60-004 Anywhere, USA		
 <b>Accuserv</b> LIGHTING & EQUIPMENT 3665 Paddock Rd Suite 208 Louisville, KY 40218 Toll Free: 877-707-7578 Phone: 502-961-0096 Fax: 502-961-0357 Web: www.glo-serv.com	<b>Type S</b> 	
Item # KB3921BK / LBL		
<b>Classification:</b> Angled Dome Reflector w/ Straight Arm Arm Dimensions: 22" x 3" Drop  <b>Finish:</b> Black  <b>Lamp Type:</b> 100 W P		 <b>Dimensions:</b> A - 10" B - 7" C - 5"
<b>Location:</b>	Exterior	E / PCN #: E52600810 / TBD
<b>Leadtime:</b>	In Stock	<b>Lamp Type:</b> 

Signage proposed on the building is described in Part II.C. above, and is depicted on the building elevations on pages 19-20. Petitioner also proposes two low, free-standing directional signs to guide motorists to the drive-through lane. The dimensions of these signs are not given, but they appear quite small on the lighting plan.<sup>6</sup> See Ex. 60(c). In addition, Petitioner proposes to reface an existing monument sign located on the northwestern side of the property, adjacent to the sidewalk along North Westland Drive, near the site entrance, and add its own signage to it. This sign is five feet high and measures approximately 27 square feet, and is shown in the photographs on pages 6 and 7 above. It is designated on the site plan as "Ex. Hollywood Tans Sign."

<sup>6</sup> The directional sign near the entrance is not actually labeled, but based on a comparison with the site plan and the size and shape of the directional sign near the drive-through entrance, which does have a label, the Hearing Examiner concludes that the small rectangle near the entrance designates a directional sign. If the special exception were approved, this omission would need to be rectified.



## ***F. Traffic***

The evidence related to traffic addressed the requirements of Local Area Transportation Review, as well two community concerns: the safety of attracting higher levels of traffic to the unsignalized intersection of Rte. 355 and North Westland Drive, and potential adverse effects of increased traffic on local roads. Each of these issues is discussed below.

### **1. LATR Requirements**

Petitioner's traffic expert, Mr. Starkey, opined that the proposed development would not have an adverse impact on nearby traffic conditions. He noted that the intersections studied -- Rte. 355 at North Westland Drive and South Westland Drive, and Walnut Hill Road (the road immediately north of the shopping center, parallel to Rte. 355) at North Westland Drive and South Westland Drive -- would operate at a level of service of C or better with the proposed development. Technical Staff agreed with this conclusion. See Staff Report at 2. The Traffic Study shows that these intersections currently have levels of service ranging from A to C, and that range would stay the same. Moreover, critical lane volume ("CLV") at each of these intersections is well below the maximum established by the County as acceptable in the area of the subject site, and the additional traffic expected from the proposed use would not cause any of the CLV numbers to exceed (or even approach) that maximum. See Traffic Study, Ex. 13(b), at 19.

Mr. Starkey explained that levels of service are described as A through F. A is the best operating condition, E represents capacity, and F suggests failure. Tr. Jan. 13 at 160. The maximum acceptable CLV in the area of the subject site is 1,475, which corresponds to a level of service of E.

Addressing specifically the intersection of North Westland Drive and South Frederick Avenue (MD 355), Mr. Starkey stated that the intersection currently operates at a level of service on the cusp of A and B in the morning peak hour, and at a level of service of B in the evening peak hour. The proposed use would have no effect in the morning, because it would not be open during the peak period. In the evening peak period, however, Mr. Starkey found that the proposed development would cause the level of service at this intersection would drop to C. Mr. Starkey stated that Technical Staff specifically requested that the safety of all turning movements be verified at this intersection and for the

two site entrances, as well as for on-site circulation. He concluded that the all of the vehicular movements necessary could be done safely.

In response to a question from a community member, Mr. Starkey explained that his traffic study covered the morning peak period and evening peak period, but not a lunch-time peak period, because he followed the Planning Board's Local Area Transportation Review ("LATR") guidelines.

## **2. Safety of North Westland Drive/Rte. 355 Intersection**

Mr. Starkey opined that the geometry of the intersection of North Westland Drive and South Frederick Avenue is more than adequate to allow safe movements in all directions. *Id.* at 161. He also presented accident data from the State Highway Administration ("SHA"), for the years 2002 through 2004. During that three-year period, a total of 29 accidents were reported at the intersection of South Westland Drive and South Frederick Avenue, which has a traffic signal, and seven at the intersection of North Westland Drive and South Frederick Avenue, which does not have a traffic signal. *Id.* at 162. The accidents at South Westland Drive were left turn accidents and/or angle accidents, which Mr. Starkey stated could be avoided through signal replacement. He stated that considering the types of accidents that took place at North Westland Drive, only three of the seven could have been avoided through the installation of a traffic signal. Mr. Starkey opined that in light of these statistics, he would not consider North Westland Drive and Rte. 355 to be a high accident intersection. He observed that left turns can be safely made from southbound Rte. 355 onto North Westland Drive using the left-turn lane. In fact, he noted, the signal at South Westland Drive creates opportunities for such turns.

When asked whether he found the difference in the number of accidents between South Westland and North Westland Drive to be significant, given that the traffic volume is three times greater at South Westland Drive, Mr. Starkey stated he did not calculate an accident rate, which would be based on average daily traffic volumes ("ADT") and number of accidents. He conceded that he had no information about unreported accidents, only those that were reported to SHA, and noted that

unreported accidents typically are those with less impact, where no one has been injured and the vehicles can be driven away.

Community members are concerned that the proposed fast food restaurant would attract students from Gaithersburg High School, which is located about half a mile north of the subject site on Rte. 355. The school has a student body of approximately 2200, 1,500 of which are permitted to leave school for lunch. See Exs. 53-54. Community member Doug Hill testified that at present, 191 students have permits to park at school, and a large number leave school for lunch. They have 45 minutes for lunch (the entire student body has lunch from 10:50 to 11:35 a.m.). Community members worry that students would drive down to the new Taco Bell, in a hurry, and take chances turning left from southbound Rte. 355 onto North Westland Drive. Community members consider this a dangerous intersection to make turns, because the traffic limit is 40 miles per hour, which is higher than the speed limit further north on Rte. 355 where other fast food restaurants are located. Testimony indicated that the community successfully petitioned for a "No U-turn" sign at North Westland Drive and Rte. 355, but some drivers still ignore it.

Community member Lou Conter undertook his own traffic study to examine the safety of the intersection of North Westland Drive and Rte. 355. He testified that initially, his goal was to test the accuracy of Petitioner's traffic study. To do this, he positioned himself in a car in the shopping center parking lot, in the second set of parking spaces, about 45 feet from the sidewalk on North Westland Drive and 70 feet from the sidewalk along South Frederick Avenue. Tr. Jan. 13 at 239-240. He counted the number of cars that made a turn at the intersection of North Westland Drive and South Frederick Avenue for one hour during the peak period identified in the traffic study (4 to 7 pm), and found that his total was within two cars of the number reported in the traffic study. As a result, he concluded that the traffic study was accurate on that point. Later,<sup>7</sup> on Wednesday, January 11, 2006, he used the same methodology to get a count of turning movements at lunch time. Mr. Conter did a count for 45 minutes, from 11:40 to 12:25, and extrapolated it to approximate a one-hour period (he divided the total by three and multiplied that amount by four). The result was an estimate of 104 turning

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<sup>7</sup> Mr. Conter did not have at the hearing the notes that would have told him what day he did the first study.

movements at the intersection during a one-hour period at lunch time. Mr. Hill relied on Mr. Conter's data to conclude that adding more trips to this already busy lunchtime intersection would be dangerous.

As Mr. Starkey's testimony pointed out, however, Mr. Conter's data cuts two ways. Mr. Starkey considers Mr. Conter's estimate to be reasonable, compared to the number of turning movements at this intersection that are recorded in the Traffic Study – 117 in the morning peak hour and 129 in the evening peak hour. Tr. Jan. 25 at 51. Mr. Starkey's conclusion from the count of 104 turning movements, however, is not that adding more lunch time trips would be dangerous, but that it is possible to make that turn. Moreover, Mr. Starkey estimated that the northbound traffic volume on Rte. 355 -- the flow of traffic that southbound drivers have to wait for to turn onto North Westland Drive -- is about half as great at lunchtime as it is during the evening peak period. With lower volumes heading north, there would be greater opportunity to make that left turn onto North Westland during lunch time than in the evening.

Mr. Starkey stated that the intersection of North Westland Drive and Rte. 355 is safely designed, with a median, a left turn lane for southbound vehicles and adequate sight distance. Moreover, based on the accident data from SHA indicating only two accidents per year, Mr. Starkey does not consider this a high accident location. Tr. Jan. 25 at 53.

Mr. Hill countered that this intersection has several problems: a downhill grade coming to the intersection, making it difficult to judge speed; a 40-mph speed limit; a situation where anyone turning left from North Westland Drive blocks the view of anyone waiting to turn right; and a large number of curb cuts on and near the northwest corner for the gas station, the Italian restaurant, and a Goodwill store located just north of the restaurant.

Taking into account all the evidence, the Hearing Examiner finds that Mr. Starkey provided sufficient probative evidence to outweigh the evidence presented by the community, and demonstrated persuasively that the proposed use would not adversely affect traffic safety in the area. He pointed out that the intersection has a median and a left-turn lane so that southbound traffic can wait safely to make a left turn, and that the signal at South Westland Drive creates opportunities for left turns

at North Westland Drive. Moreover, his analysis of Mr. Conter's traffic data was persuasive – if 104 cars made the left turn safely in a one-hour period in the middle of a weekday, it suggests the maneuver is not overly dangerous. Moreover, the evidence of 191 student cars at the high school, some of which might come to the subject site on any given day, does not suggest an increase in traffic great enough to overwhelm the intersection of North Westland Drive and Rte. 355, which already handles 129 left turns during the height of evening rush hour.

### **3. Neighborhood Cut-through Traffic**

Another concern raised by community members is their observation that instead of driving through the shopping center parking lot to get to Walnut Hill Road, cars tend to exit the shopping center on North Westland Drive, turn right, then turn right on Walnut Hill Road to get to South Westland Drive, at the other end of the shopping center, where they can enter Rte. 355 at a signalized intersection. Mr. Starkey discounted the prevalence of this phenomenon, stating that he does not expect the proposed development to direct traffic through the neighborhood. His firm performed traffic counts at the intersections of Walnut Hill Road with North and South Westland Drive, and found that there were about 30 to 35 vehicles going through those intersections during the peak hour. He considers this in line with the number of homes in the area, which area residents described, before the Planning Board, as about 45 residences.

The Hearing Examiner notes that the text of the Traffic Report states an assumption that a very small amount of traffic to and from the subject site would travel on South Westland Drive, or eastbound on North Westland Drive. See Ex. 13(b) at 15. The diagrams showing anticipated traffic movements, moreover, show *all* traffic generated by the proposed use during the evening peak hour would exit the site by turning left onto North Westland Drive.<sup>8</sup> See Ex. 13(b) at 16-17. No vehicles are shown exiting the site by driving through the shopping center parking lot to South Westland Drive, or turning right on North Westland Drive. See Ex. 13(b) at 16-17. This may be because the percentages

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<sup>8</sup> The report estimates 25 pass-by trips exiting the site during the evening peak hour, and 22 new trips exiting the site during evening peak hour; the trip distribution diagram for new trips shows 22 vehicles turning left from the site driveway onto North Westland Drive (only one site driveway is shown on the trip distribution diagrams, providing no breakdown of which curb cut vehicles are expected to use), and the trip distribution diagram for pass-by trips shows 25 vehicles turning left from the site driveway onto North Westland Drive.

assumed to use either South or North Westland Drive are so small (see table below), that when applied to the anticipated traffic volumes, they equal less than one trip.

**Trip Distribution Table from Traffic Study, Ex. 13(b) at 15**

<b>Direction (To and From)</b>	<b>Percentage</b>
North on MD 355	70%
South on MD 355	25%
West on S. Westland Drive	3%
East on N. Westland Drive	1%
East on S. Westland Drive	1%

The Traffic Study explains that trip distribution was estimated based on existing traffic patterns in the study area, rather than distribution figures contained in the LATR guidelines, because “the LATR guidelines present a distribution which is too far reaching for such a use.” *Id.* at 15. The trip distribution recommended in the LATR guidelines is not provided for comparison purposes, and Technical Staff made no comment on the distribution method, so its accuracy is difficult to assess.

Mr. Starkey commented that Technical Staff found the number of turning vehicles his firm counted was in line with the number of homes on the street. His statement contradicts the Staff Report, however, which states that “Since only 17 homes front this block of Walnut Hill Road, Transportation Planning Staff concludes that through traffic does use this segment of Walnut Hill Road, but that the through traffic is generated by both nearby commercial and residential land uses and would not be substantially increased by the proposed action.” Staff Report at 11. *Id.* Mr. Starkey testified that Staff’s estimate of 17 homes was incorrect, in light of the information provided by the community suggesting there are 45 homes in the area. The Hearing Examiner notes that Mr. Starkey did not provide detailed enough information to ascertain whether the community’s estimate of 45 homes “in the area” was limited to the block of Walnut Hill Road abutting the shopping center, or extended farther away. Moreover, the aerial photograph reproduced on page 10 above shows 18 lots on the block of Walnut Hill Road abutting the shopping center (counting all of the corner lots). This undercuts the credibility of Mr. Starkey’s testimony, and supports Technical Staff’s conclusion that through traffic does use this segment of Walnut Hill Road.

Even counting 17 or 18 homes on the block, Technical Staff concluded that the proposed use would not substantially increase through traffic on Walnut Hill Road. Staff provided absolutely no reasoning to support this conclusion, however, making it difficult to accord it any weight. Technical Staff described the volume of traffic on Walnut Hill Road as low, equivalent to an average of one vehicle every 1.5 to 2 minutes. However, the Traffic Study estimated that the proposed use would generate approximately 100 trips during the evening peak hour,<sup>9</sup> and Mr. Lubin estimated that the drive-through lane would draw about 30-35 vehicles an hour during the peak period. See Ex. 13(b) at 14, Tr. Jan. 13 at 150. The relevant question is whether any of these vehicles would be likely to turn right on North Westland Drive upon exiting the site rather than left, and use Walnut Hill Road and South Westland Drive to get onto Rte. 355. In the Hearing Examiner's view, this question has not been satisfactorily answered.

Community members presented anecdotal evidence about seeing vehicles use Walnut Hill Road upon exiting the shopping center. Long-time Walnut Hill resident Doug Hill testified that neighborhood residents see trucks leave the lower level of the shopping center and use Walnut Hill Road on a daily basis. See Ex. 55; Tr. Jan. 13 at 212-214. Mr. Hill played a video clip during the hearing, which he filmed the day before the hearing. See Ex. 56. The clip shows several large trucks parked parallel to North Westland Drive, taking up a large number of the parking spaces in the lower lot. It also shows a public utility truck leaving the site and turning right on North Westland Drive, but Mr. Hill was not able to follow it to see where it went from there. It may have taken Walnut Hill Road to get to South Westland Drive and Rte. 355, or it may have proceeded into the neighborhood to its work destination.

The Traffic Study did not include traffic counts for the site driveways that would have provided an indication of how much shopping center traffic currently turns right on North Westland Drive and then right again on Walnut Hill Road. Absent such information, the record lacks the substantial,

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<sup>9</sup> This includes 51 new trips and 50 trips that are assumed to be "pass-by" trips, meaning that drivers are on the road already, and make a stop at the Taco Bell/Long John Silver's along the way, rather than making a special trip just to go there. See Ex. 13(b) at 14. Pass-by trips are not considered to add traffic to area roadways. The Hearing Examiner considers them relevant to this particular issue, however, because they do add to the number of cars exiting the subject site onto North Westland Drive.

probative evidence necessary to support a conclusion as to whether site-generated traffic would cause an increase in traffic on Walnut Hill Road substantial enough to adversely affect residents.<sup>10</sup>

### ***G. Need for Proposed Facility***

Pursuant to Section 59-G-1.25 of the Zoning Ordinance, a special exception for a drive-in restaurant may be approved only if the Board of Appeals finds, “from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.” Petitioner attempted to provide the evidence necessary to support such a finding by submitting a five-page document entitled “Proof of Need Analysis,” Exhibit 13(a), which was prepared by Yum! Brands, Inc., Taco Bell’s parent company. No witnesses were presented to allow cross-examination concerning this report, so there was no opportunity for other parties or the Hearing Examiner to ask questions about the methodology.

By way of commenting on Petitioner’s Proof of Need Analysis, Technical Staff presented its own analysis of the number of restaurants in the general area, concluding that there is a need for the proposed Taco Bell. See Memorandum dated July 6, 2005 from Krishna Akundi and Gary Goodwin to Elsabett Tesfaye, included in Attachments package accompanying Staff Report (known hereinafter as “Staff Need Analysis”).

Opposition witnesses presented extensive evidence undercutting the persuasive value of both Petitioner’s and Technical Staff’s need analyses. The evidence from each of these sources is

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<sup>10</sup> Mr. Starkey noted that based on his traffic counts, approximately five percent of the cars turning from Rte. 355 onto North Westland Drive during the evening peak hour turn right on Walnut Hill Road, and about eight percent in the morning. This suggests that most of them go into the shopping center or one of the businesses on the north side of North Westland Drive. Mr. Starkey attempted to argue that if these cars were using Walnut Hill Road when they leave the shopping center, the turning volumes onto Walnut Hill Road would be higher. Tr. Jan. 25 at 55. This argument was fatally undercut by cross-examination by Mr. Hill, during which Mr. Starkey acknowledged that he does not have any data for the number of cars exiting the shopping center onto North Westland Drive, and that cars entering the shopping center during the peak hour may have gone out at the other end, or stayed in the shopping center until after the peak hour was over. Mr. Starkey conceded that the only way to determine explicitly how many cars turned right out of the shopping center and also turned right onto Walnut Hill Road would be to do a license plate survey, recording the license plate number of every vehicle turning right out of the shopping center and every vehicle turning right onto Walnut Hill Road, then comparing the two. *Id.* at 61-62.



summarized below, together with observations made by the People's Counsel and the Hearing Examiner.

### **1. Petitioner's Proof of Need Analysis**

Petitioner's Need Analysis described the following as the "traditional factors" considered in evaluating the need for a quick service restaurant (Ex. 13(a) at 2<sup>11</sup>):

- Whether the existing and proposed restaurants adequately meet the demand generated by residents, shoppers and employees in the Market Area; and
- Whether the existing and proposed restaurants provide reasonably convenient choices of food brands and services for residents, shoppers and employees in the Market Area.

The Need Analysis describes the source of its data as "Experian/Applied Geographic Solutions." *Id.* It provides no explanation of what that phrase refers to, although the Hearing Examiner presumes that this is the name of a private consulting firm. The Hearing Examiner notes that in past special exception cases where community need was at issue, need analyses have used widely respected, publicly-available sources of data such as the Washington Area Council of Governments. The record does not provide any evidence concerning the reliability of Petitioner's source of data.

The Need Analysis states that the subject site would provide service to residential areas to the east, as well as patrons of the shopping center and employees working in surrounding commercial development. It goes on to say that the Rte. 355 corridor is widely recognized as a major transportation corridor in Montgomery County, and, therefore, the subject site is an ideal location to reach customers traveling to or from nearby businesses or other destinations. *Id.* at 2.

The table reproduced below is excerpted from page two of Petitioner's Need Analysis:

Radius	1	1.5	2	2.5	3	5
Population	9,186	32,621	55,327	81,657	114,248	251,429
Proj. Growth % (5 years)	10.5%	8.2%	7.9%	8.6%	9.4%	9%
Median Age (yrs)	33.7	33.0	34.2	34.1	35.0	36.1

<sup>11</sup> For convenience, the Hearing Examiner has added handwritten pages numbers to the unnumbered pages of Petitioner's Need Analysis .

Median Family Income	\$61,349	\$61,306	\$63,852	\$65,557	\$70,316	\$77,606
Daytime Population	14,159	29,085	44,825	60,102	76,215	134,434
	City Population	34,910			County Population	926,508

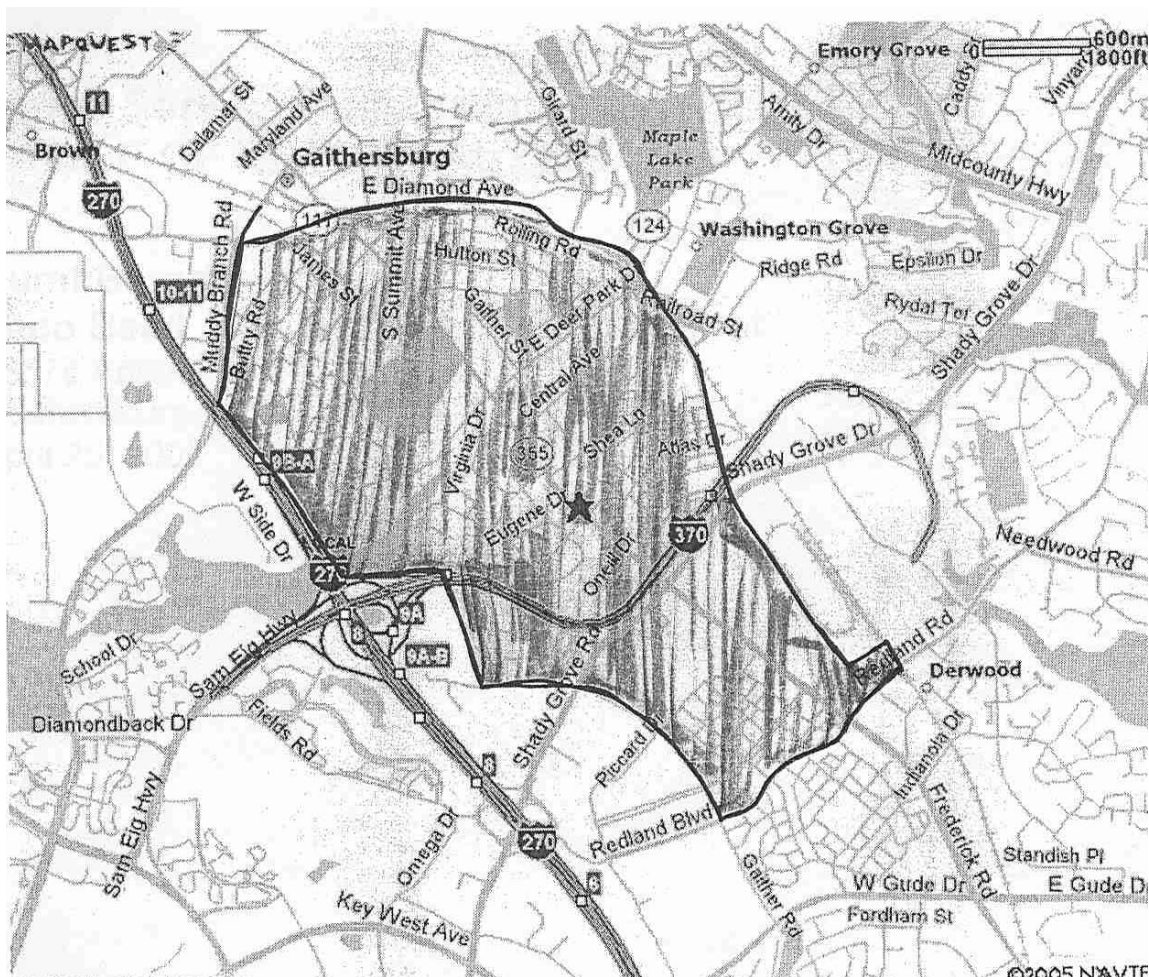
Following this table, the Need Analysis notes that the pending Shady Grove Metro Area Master Plan (described as “within the southern boundary of the Market Area”) calls for the addition of thousands of residents, and commercial development, over the next several years, which is not reflected in the table. The Need Analysis concludes that such development would increase the population and, consequently, the need for the proposed restaurant.

Virtually no discussion of this table is provided, nor are any of its parameters explained. For example, do the “Radius” numbers at the top of each column represent distances from the subject site measured in miles, or something less obvious? What are the implications of the population numbers, e.g., how many quick service restaurants are needed to serve the population levels shown? Do these population groups have more quick service restaurants in close proximity than similarly-sized groups in other parts of the County, or fewer? How were the growth projections within each of these geographic areas over the next five years derived? Do the median age numbers pertain to heads of household, or to all residents? What are the implications of these median age figures, e.g., do people in this age range eat more or less fast food than that general population? What are the implications of the median family income figures, e.g., do families at these income levels eat more or less fast food than the general population? How were the daytime population numbers derived? Do they represent actual figures based on surveys or other data, or are they estimates? If the latter, what are they based on? In the Hearing Examiner’s view, this data, standing alone without context or explanation of any kind, is totally unpersuasive.

The background data provided in the Need Analysis concludes by noting that the intersection of Rte. 355 and South Westland Drive is signalized, and that the Maryland Department of Transportation reports an average daily trip volume on South Frederick Avenue of 36,375.

The Need Analysis next addresses the market area, i.e., the area from which the majority of patrons will initiate their trips. It states that “[b]ased on studies conducted at other Quick Service Restaurants owned and operated by Yum! Brands, the Market Area is limited by the driving distance to the restaurant.” *Id.* at 3. Based on the traffic patterns and development surrounding the proposed site, the Need Analysis established a four-minute drive time as the definition of the Market Area. This Market Area is displayed on the map below. It extends from Redland Road on the south to the intersection of Rte. 355 and S. Summit Street on the north, with the eastern and western boundaries “formed by the development pattern and drive time.” *Id.* at 3.

**Petitioner’s Market Area Map, Ex. 13(a) at 5**



As the People’s Counsel pointed out in his closing argument, the definition of the Market Area is the single most important element of any need analysis, and yet this Need Analysis does not adequately explain the basis for its Market Area definition. To state simply that it was based on “the

traffic pattern and development surrounding the proposed site”, without more, is not enough. What are the traffic patterns and development that led to a conclusion that most customers will drive no more than four minutes to get to the proposed restaurant? Why not five minutes, or six or ten? More fundamentally, on what sound basis can one estimate a market area based on driving times, which vary depending on mutable factors such as traffic congestion, the timing of traffic lights, and individual driving styles? What assumptions about these factors were made in deriving the market area map attached to the Need Analysis, e.g., heavy traffic congestion? Hitting all the red lights? Following the speed limited exactly? There is simply not enough information in the Need Analysis to give it serious persuasive value.

Petitioner's Need Analysis identified only two quick service restaurants in the defined Market Area, a Checker's Drive-In and a Burger King, each of which is 0.6 miles from the subject site. The report provides sales volume figures for each of these restaurants, which it describes as “strong.” See Ex. 13(a) at 3. The report notes that neither of these restaurants is a “direct competitor” of the proposed restaurant, nor are any other quick service restaurants within several miles of the site (McDonald's, Wendy's, Popeye's, Kentucky Fried Chicken and Boston Market) direct competitors. Consequently, the report concludes that there is a strong need for the proposed Taco Bell/Long John Silver's restaurant.

Citing national data that Yum! Brands has compiled to link demographics to a need for quick service restaurants, the Need Analysis concludes that with a residential population of over 10,000 in the Market Area, plus the use of Rte. 355 as a major transportation corridor in the afternoon and evenings, “the market could be served by more than the three existing and proposed Quick Service Restaurants and, therefore, on that basis alone, there is a need for the proposed restaurant.” *Id.* at 3-4. It may be that Yum! Brands has data to support this conclusion, but none of it has been provided, and merely stating that the data exists is not persuasive. The Need Analysis identifies the “strong daytime population” and traffic generated by the shopping center as a second strong basis for the need for the proposed restaurant, noting that research shows employees often use their lunch breaks to run

errands, such as grocery shopping or renewing a driver's license, and look for meal options convenient to those activities. This description may be the most persuasive element in the entire Need Analysis. It is not enough, however, to make the document as a whole persuasive.

## **2. Technical Staff Need Analysis**

Staff of the Research and Technology Center at MNCPPC submitted a one-page analysis of Petitioner's Proof of Need Analysis. It notes, correctly, that the Zoning Ordinance does not specify what shall constitute a needs test in special exception cases. Staff states that it considers two factors, proximity and choice, in assessing "the public convenience and service . . . considering the present availability of such uses to that neighborhood," citing Section 59-G-1.24 of the Zoning Ordinance. The Hearing Examiner notes that Staff has focused its analysis on the wrong section of the Zoning Ordinance. Section 59-G-1.24 pertains to a "Neighborhood Need" requirement that applies to uses such as gas stations and community swimming pools. In the case at hand, the applicable need requirement is stated in Section 59-G-1.25, entitled "County Need." Nonetheless, the two "need" requirements are sufficiently similar that Staff's analysis may still be considered.

Technical Staff posed the two relevant questions thus: "Does the neighborhood have convenient access to quick service restaurants and particularly to Mexican and Seafood quick service restaurants? Secondly, does the proposed use, [sic] offer the residents of the neighborhood greater choice?"

With respect to proximity, Staff "agrees with petitioner that customers to Walnut Hill Shopping Center will benefit from a quick service Mexican/seafood restaurant on the grounds." With respect to choice, Staff identified 94 restaurants in zip code 20877 (the zip code assigned to the subject site), among which Staff found a dearth of Mexican restaurants, and particularly quick service Mexican. Staff also noted that database information on the Walnut Hill Shopping Center indicates that it has no quick service restaurants. Based on this information, Research and Technology Center Staff concluded that neighborhood choice would be enhanced by the proposed use.

The Hearing Examiner finds the cursory level of research and analysis supplied in the Staff Need Analysis largely unpersuasive. Staff provides no support for the decision to use a zip code as a proxy for the market area, absent any evidence linking the size and shape of the zip code area to economic activity. The Hearing Examiner notes, based on a review of an ADC map of Montgomery County (of which the Hearing Examiner takes official notice), that zip code 20877 begins just a few blocks south of the subject site, and extends more than a mile to the north. On what basis did Staff conclude that Mexican restaurants in the next zip code to the south would not be in the same “market” as the proposed use? Staff does not even explain how it got from a total of 94 restaurants to a “dearth” of Mexican ones. How many Mexican restaurants did Staff identify among the 94? How was the list of 94 restaurants compiled, and how were the types of cuisine served identified? The Staff Need Analysis fails to answer even these very basic questions, leaving its findings as unsupported, conclusory statements.

Instead of providing an independent, but extremely cursory analysis, the Hearing Examiner would have found it more helpful for Research and Technology Center Staff to have applied their considerable economic expertise – which has been demonstrated in other cases – to either critiquing or supporting Petitioner’s Need Analysis.

### **3. Opposition Critique of Petitioner’s Need Analysis**

Community members opposed to the proposed use put a great deal of time and effort into gathering data to undermine both Petitioner’s Need Analysis and Staff’s. With regard to Petitioner’s Need Analysis, Mr. Conter presented evidence focused on the accuracy – or lack thereof – with which Petitioner drew the Market Area. Mr. Conter did not quarrel with the premise that the Market Area should be defined by a four-minute drive time. Rather, he argued that the map attached to Petitioner’s Need Analysis underestimates the number of quick service restaurants that are within a four-minute drive of the subject site.

Mr. Conter presented a map of the general area, on which he identified all of the restaurants he could find with drive-through service. To test the validity of Petitioner’s Market Area

map, Mr. Conter drove four minutes south from the subject site, four minutes to the north, and four minutes to the east and west.<sup>12</sup> He found that within four minutes, he reached several drive-through restaurants that Petitioner claimed were outside a four-minute drive. For example, to the south, Petitioner's defined market area stops just short of a Wendy's restaurant and a McDonald's, both of which are less than 400 feet outside the market area boundary. To the east, Mr. Conter identified a McDonald's less than half a mile outside Petitioner's defined market area. To the north, he found that within four minutes, he could reach three drive-through restaurants that were excluded from Petitioner's Market Area. See Exhibit 47(c) for Conter's drive times.

The results of Mr. Conter's research suggest that there are eight drive-through restaurants within a four-minute drive of the subject site, not two. This is shown on Exhibit 47(b), reproduced on the next page (the map identifies the location of each restaurant with a picture of a push-pin – restaurant names were added by the Hearing Examiner based on a handwritten annotation provided at the hearing). This exhibit compares Petitioner's mapping of the four-minute-drive Market Area, an irregular shape, with an ellipse that Mr. Conter believes more accurately reflects the area within a four-minute drive of the subject site. On this basis, Mr. Conter concludes that the area is adequately served by drive-through restaurants. Tr. Jan. 13 at 190.

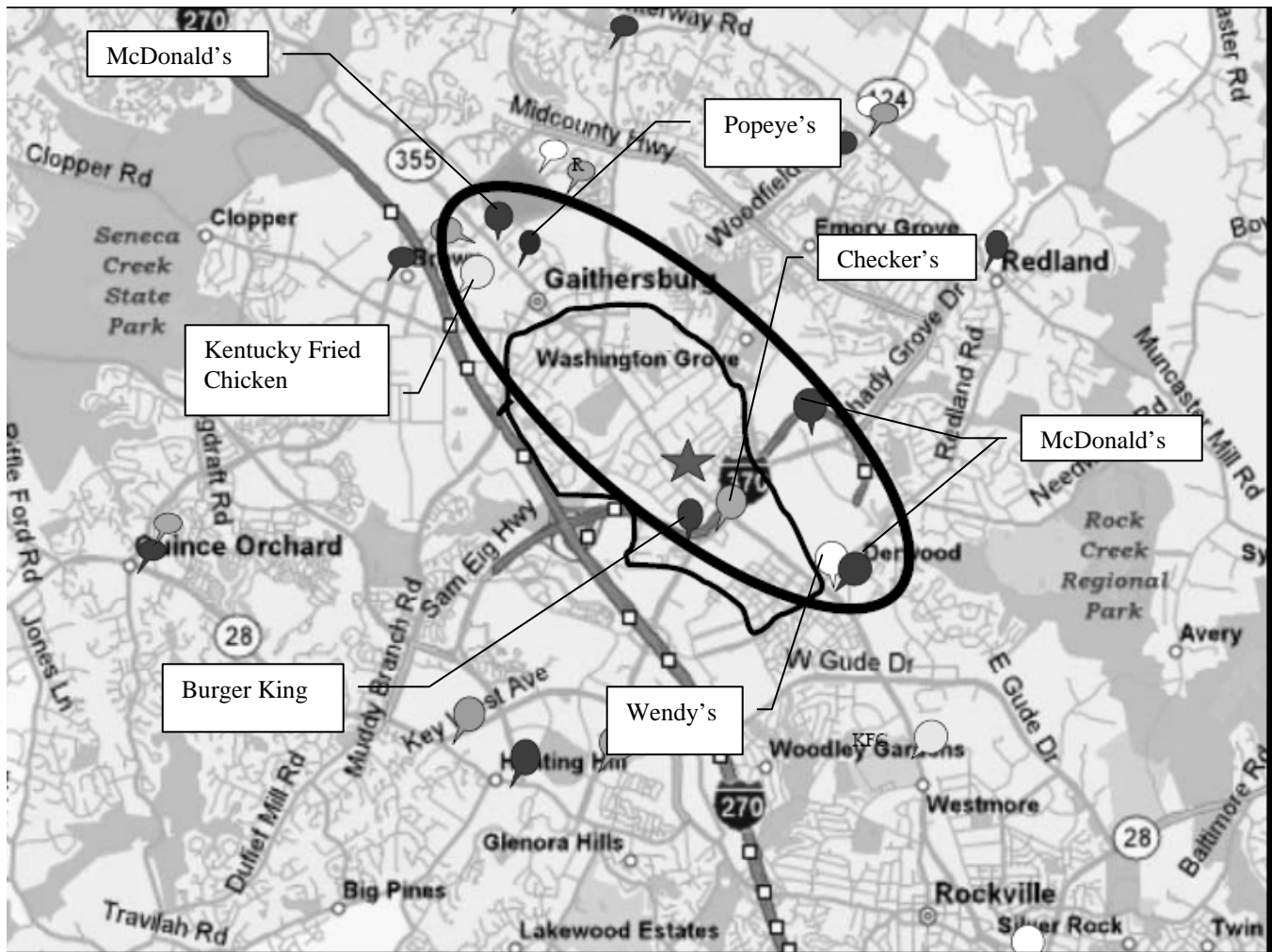
Petitioner brought a rebuttal witness to challenge Mr. Conter's findings. He was not the author of Petitioner's Need Analysis, but rather Taco Bell's construction manager for this region, Bharat Parikh. Mr. Parikh testified that he drove around with a GPS (Global Positioning System) device trying to find the locations identified on Mr. Conter's map. He located 23 of the 27 listed, and stated that all of them were in different locations from what is shown on the map. In addition, he found that two do not have drive-throughs and one is a Krispy Kreme store, which is not a meal choice. Tr. Jan. 25 at 31. Mr. Parikh reviewed individually each of the locations that he found inaccurate, and the ones that he could not find. Where he found the locations inaccurate, they were off by one or two blocks. The Hearing Examiner observes that the level of inaccuracy was minor, and in no case did it make any

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<sup>12</sup> Mr. Conter testified that he did the driving he described on Tuesday, January 10, 2006 at 6:30 p.m., in rush hour traffic, and again on Thursday, January 12, 2006 at 4:30 p.m. He stated that he drove through the parking lot of each of the restaurants.

difference as to whether the restaurant was within the four-minute drive time estimated by Petitioner's Need Analysis or by Mr. Conter. Cross-examination suggested that Mr. Parikh missed some restaurants that are located inside shopping malls. More importantly, the Hearing Examiner notes that none of the restaurants Mr. Parikh could not find were within the ellipse that Mr. Conter identified as within a four-minute drive of the subject site, so they are not important to this analysis.

**Opposition Map of Market Area, Ex. 47(b)**



Mr. Parikh also tested some of the drive times to restaurants that Mr. Conter argued could be reached within a four-minute drive. Mr. Parikh drove to some of the restaurants and found that it took him longer than four minutes in both directions – from the subject site to the restaurant, and from the restaurant to the subject site. (See summary of Parikh testimony, Part III below, for details on drive times.) He explained, for instance, that the Wendy's and McDonald's just outside Petitioner's Market



Area are, indeed, geographically quite close, but one has to go through an extra traffic light and make a U-turn to reach them from southbound Rte. 355, which adds to the drive time. Tr. Jan. 25 at 41-43. He also noted that he drove to one restaurant twice, with two quite different drive times, which he attributed to traffic lights. In the Hearing Examiner's view, these observations underscore the vagaries associated with defining a market area solely by drive time, and the weakness of Petitioner's Need Analysis in failing to explain the basis for its market definition.

The Hearing Examiner sees no need to decide whether Mr. Conter or Petitioner's representatives were more accurate in their driving-time estimates. Regardless of whether Petitioner's Need Analysis accurately identified the number of quick service restaurants within a four-minute drive of the subject site, the analysis was so superficial and lacking in detail as to be quite unpersuasive (as discussed in Part II.G.1 above).

#### **4. Opposition Critique of Technical Staff's Need Analysis**

Mr. Conter proffered an email that he received from Krishna Akundi, Senior Planner at the MNCPPC Research and Technology Center, in response to an inquiry about Staff's research in this matter. See Ex. 48. The email describes Dr. Akundi's review, which started with a computerized search through a database called Reference USA, which allows the user to search for businesses by zip code and business type. Staff searched for all restaurants in the 20877 zip code. Dr. Akundi reports that this search resulted in a list of 94 restaurants, which he provided to Mr. Conter. Staff performed an additional search in the database for Mexican restaurants in the same zip code, turning up six restaurants, none of which appear to offer drive-through service. This was the basis for Staff's conclusion that there is a dearth of Mexican restaurants in that zip code. In his email to Mr. Conter of January 10, 2006, Dr. Akundi states, "The database returned six [Mexican] restaurants. Hence our comment that there was a "dearth" – one can take issue with the use of that descriptor; it is quite possible to argue that we took undue license with our language."<sup>13</sup> Ex. 48. Mr. Conter pointed out that six restaurants represent 6.5 percent of the total restaurant population, which Mr. Conter does not believe constitutes a "dearth" of Mexican cuisine. Based on his email message to Mr. Conter, it

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<sup>13</sup> The *American Heritage Dictionary*, Second College Edition 1985, defines "dearth" as "Scarcity; lack."

appears that even Dr. Akundi found the conclusion in the Staff Need Analysis that there is a lack of Mexican restaurants in the relevant zip code to be overstated, and therefore unpersuasive.

Using the same database that Technical Staff used, Mr. Conter replicated Staff's search for restaurants in the 20877 zip code. His search resulted in a list of 93 names, rather than 94 (we have no explanation for why he turned up 93 rather than 94). In reviewing the list, Mr. Conter saw that one of the locations listed is a restaurant chain corporate headquarters, leaving 92 restaurants. In addition, the Hearing Examiner pointed out that the first numbered line on the list is actually a row of column headings, not a restaurant. This reduces the number of restaurants to 91, and indicates that the percentages provided in the testimony are slightly inaccurate.

Mr. Conter also reviewed more detailed information on each entry in the database, including lines of business and contact information. He noticed that some restaurants listed specific lines of business, like "Tex-Mex," and others just listed "restaurant." Mr. Conter then telephoned every restaurant on the list that had a Spanish name, and asked what kind of food they serve (he did not call one restaurant where he had eaten, and which he therefore knew serves Mexican food). If the person answering did not readily respond, he followed up by asking "Latin American?" so as not to steer them toward Mexican. One restaurant that described itself as Mexican on the phone was listed in the database as a Chinese restaurant, indicating a lack of complete accuracy. The results of his inquiries are listed on a table attached to Exhibit 48, which shows all the restaurants as listed in the database, plus additional information added by Mr. Conter indicating which ones he called and identifying the one corporate office.

Based on Mr. Conter's detailed research, he concluded that there are 11 Mexican restaurants in the 20877 zip code, representing more than 12 percent of the total restaurant population. This is more than the percentage represented by Chinese restaurants, or restaurants that say they serve pizza. Mr. Conter argues that Technical Staff used an inaccurate database and did sloppy work by not pursuing it farther than a secondary search, so their conclusion should be discounted.

Under cross-examination, Mr. Conter conceded that he searched only for Mexican restaurants, not seafood restaurants, and did not research whether any of the restaurants offered drive-through service, because his goal was to test the accuracy of Technical Staff's Need Analysis, and Staff did not focus on seafood restaurants or drive-throughs.

On rebuttal, Taco Bell manager Mike Lubin testified that the only Mexican restaurant on the list that he knows to be a quick service restaurant is Chipotle's. He was familiar with one other on the list, which is not a quick service restaurant, and the others are unfamiliar to him. He considers Chipotle's a competitor, although they do not have a drive-through. Mr. Lubin considers all fast food restaurants to be competitors for the proposed restaurant, even if they do not serve Mexican food or seafood.

### **5. Additional Opposition Evidence**

Mr. Conter presented a print-out from Taco Bell's website showing that there are five Taco Bell restaurants within five miles of zip code 20898. See Ex. 50. Mr. Conter explained that the website locates restaurants based on distance from the specified zip code. He chose the zip code 20898 because it is a very small zip code, used exclusively for the County transfer station located a few blocks south of Walnut Hill Shopping Center, making it a central location that is representative of the general neighborhood as a whole. Tr. Jan. 13 at 201-202; 237-38.

### ***H. Development Standards***

The table below combines development standards tables from the original and supplemental Staff Reports, Exhibit 32 at 14-15 and Exhibit 36 at 4-5, which support Technical Staff's conclusion that the proposed development would comply with all applicable development standards under the C-2 Zone.<sup>14</sup>

#### **C-2 Zone Development Standards, Per Technical Staff**

<b>Current Development Standard</b>	<b>Required/Allowed</b>	<b>Proposed/Existing</b>
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<sup>14</sup> The development standards table in the supplemental report has two different numbers for the building height requirement. The second one is apparently a typographical error and has not been included here.

Maximum Building Height	3 stores or 42 feet	1 story, 23.5 FT to the top of the building
FAR	1.5	0.21
Green Area	10 %	30 %
Minimum Building Setback		
Front Yard	10 FT	24.5 FT (N. Westland Dr.)
Rear Yard	0	n/a
Side Yard	0	n/a
Parking requirement	37 spaces	37+ (shared)
25 spaces per 1,000 SF of patron area, 1,373 SF of patron area		

The C-2 Zone includes the following side and rear setback requirements (§ 59-C-4.353(b)):

- (1) If the lot adjoins a residential zone, the setback must not be less than required in the adjoining zone.
- (2) In all other cases no setback is required.
- (3) No yard must be less than 3 feet in width.

Technical Staff operates on the premise that the setback requirements under the C-2 Zone for a lot abutting a residential zone do not apply here, because only the shopping center parking lot abuts a residential zone, not the special exception site. See Suppl. Staff Report at 4. Thus, Staff has listed the side yard requirement as “zero.” The Hearing Examiner is not persuaded that Staff’s presumption is correct. It may be that the more appropriate interpretation would be to approve the special exception only if all areas to be used in its operation, including the parking lot, comply with the development standards for the zone. However, in this case, the shopping center is undoubtedly grandfathered as a nonconforming use, so the current development standards do not apply.

Petitioner’s Site Plan has a development standards table, as well, which matches Staff’s table with regard to the front, side and rear building setbacks. See Ex. 60(a). The Site Plan adds that the “landscaping setback” is three feet from North Westland Drive, which may be another way of saying, per §59-C-4.53((b)(3), that any yard, including the front yard on North Westland Drive, must be at least three feet in width. It also lists a building setback from Rte. 355 that does not seem to apply to the C-2 Zone (the C-3 Zone contains the provision listed on the Site Plan, but not the C-2 Zone). In sum, it appears that the proposed building would satisfy the minimal development standards that apply.

### ***I. Utilities and Environment***

The evidence indicates that all necessary utilities are available on site, and that the petition raises no environmental issues. The subject site has no natural features, and the proposed development would increase the amount of green space, improving the area's immediate environment.

### ***J. Community Participation***

Community sentiment as expressed in the record of this case is overwhelmingly in opposition to the petition. Counsel for Petitioner represented that a number of community members expressed support for the petition to her, and that she had been told the City of Gaithersburg (the municipal boundaries of which border the site) would be submitting a letter in support. Tr. Jan. 13. at 18. The record reflects no letters in support.

Nine community members testified in opposition to the subject petition, several of them bringing demonstrative exhibits and other evidence to counter Petitioner's evidence. Several of the participating community members took the commendable step of going beyond personal observations, focusing their testimony on pointing out weaknesses in Petitioner's evidence, to demonstrate why the petition fails to satisfy the requirements for the use. The arguments and testimony made by community members are described in detail in Part III, below, and many of them are incorporated in the substantive discussions above. The principal concerns expressed by community members may be described as follows:

- The proposed use would be so close to the nearest houses that the residents would be adversely affected by noise, traffic, headlights, exhaust fumes, food odors, trash and other activity, especially related to the drive-through.
- The homes abutting the shopping center already suffer from the lack of a buffer, and the impacts would be much worse with a busy drive-through open until the early morning hours.
- The late hours would attract undesirable night-time activity and increase existing problems with loitering in the parking lot.

- The new parking lot lights would cause glare problems for the nearby homes.
- The proposed use would draw more cut-through traffic on Walnut Hill Road.
- Increased traffic at the unsignalized intersection of North Westland Drive and Rte. 355 would exacerbate dangerous conditions at that intersection, particularly considering the number of high school students who could potentially come to the site for lunch.

In addition to letters from several opposition witnesses, the record includes three letters in opposition from other individuals. One is from the agent for the Gateway Commons Homeowners Association (“HOA”), Todd Hassett, representing a neighborhood just southeast of the Walnut Hill Shopping Center. See Ex. 58. This letter reiterates many of the concerns that Fran Monblatt, president of the HOA, raised during the hearing, i.e. that the shopping center area already has problems with noise, loitering, trash, vehicles speeding through the surrounding streets, and loud vehicles disturbing the neighbors. Mr. Hassett states the HOA’s opposition to the petition, and asks that if it is approved, the restaurant be required to close at 11:00 p.m. on weeknights and midnight on weekends.

Kathryn Schumacher states that the proposed business, with its excessive hours, will draw an undesirable, late night element to this reasonably quiet area. See Ex. 15. Walnut Hill residents S. and C. Demidenko write that the existing stores at the Walnut Hill Shopping Center all have decent hours, and a Taco Bell open until the early morning would destroy the neighborhood. See Ex. 19. They are concerned about the kind of activity that would take place at 3:00 or 4:00 in the morning, leading to problems with noise, traffic, trash, and possibly even gangs coming down from Old Town Gaithersburg, a couple of miles away.

#### **IV. SUMMARY OF HEARING**

##### ***A. Applicant’s Case in Chief***

1. Kira Kabo, site planner. Tr. Jan 13. at 21-106.

Ms. Kabo was designated an expert in site design and site development.<sup>15</sup> She described the subject site's location, slightly north of the exit to and from Rte. 370 on South Frederick Avenue, just south of the City of Gaithersburg city limits. The site comprises approximately 0.42 acres within the 7.8-acre Walnut Hill Shopping Plaza. Ms. Kabo explained that the area that would be subject to the proposed special exception is limited to the leased area, as shown on the site plan.

Ms. Kabo described the shopping center and other nearby land uses, including the music store and the auto parts/repair shop, a row of commercial uses across North Westland Drive and two churches across South Frederick Avenue.

Ms. Kabo stated that access to the proposed restaurant would be provided most directly from North Westland Drive, but would also be available through the entrances to the shopping center on South Frederick Avenue and South Westland Drive. There are currently three curb cuts on North Westland Drive along the site frontage, but Taco Bell would improve that situation by eliminating the middle one. Ms. Kabo noted that there are no unusual topographic conditions, and all necessary utilities are available on site.

Ms. Kabo reviewed the land use history of the subject site, which was occupied for many years by a bank with a drive-through window, and most recently by a tanning salon, for a short time. She stated that it was designed as a drive-through facility. Landscaping was limited to a few trees and shrubs along North Westland Drive, which are not in good condition and do not help make the shopping center attractive.

Turning to the proposed development, Ms. Kabo described the proposed building and signage. No signs are proposed for the side of the building that would face the Walnut Hill residential neighborhood. The submitted elevations suggest that the rear of two decorative elements of the front façade would be visible from the nearby residences -- an arch above the Taco Bell side of the building,

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<sup>15</sup> Petitioner's counsel requested a broader designation of expert in civil engineering and land planning, but preliminary questioning of Ms. Kabo revealed that she lacks a thorough understanding of the standard of review for special exceptions in Montgomery County. Tr. Jan. 13 at 21-31. In particular, she was not familiar with how inherent and non-inherent adverse effects are evaluated in Board of Appeals cases. Moreover, while Ms. Kabo is certified as an engineer in seven countries of Europe, she is not a licensed professional engineer in the United States. Ms. Kabo was designated an expert in site design and site development in recognition of her extensive experience in land development.

and a tower atop the Long John Silver side. The arch would be about 25 high, about 7 feet higher than the building (building height is measured to the top of the parapet). The tower would be about 28 feet high, or about ten feet taller than the building. Tr. Jan. 13 at 96-97. Ms. Kabo testified, however, that because of the 150-foot distance between the building and the residential area, only the parapet would be visible, not the decorative elements. Tr. Jan. 13 at 55-56. She added that the signs would be illuminated, but the arch and the tower would not be. *Id.* at 54-55.

Ms. Kabo reviewed the compliance of the proposed building with the setback requirements she considers applicable: a 70-foot setback requirement from the center line of South Frederick Avenue, where the building would be 178 feet back from the center line, and a 10-foot setback requirement from North Westland Drive, where the building would be 24 feet from the property line.<sup>16</sup> *Id.* at 56-57. She noted that there are no applicable side or rear setbacks. Ms. Kabo stated that the one-story portion of the proposed building would be 18.5 feet in height and the one-and-a-half-story portion would be 23.5 feet high, both well under the 42-foot/three story maximum height in the C-2 Zone. She noted that the C-2 Zone requires a minimum of ten percent green area, and the proposed site plan provide for 30 percent. The Zoning Ordinance requires a minimum of 37 parking spaces, and the parking area between the subject site and the 7-Eleven has more than that.

Regarding the drive-through lane, Ms. Kabo stated that the lane would have space for eight cars to wait. The site plan also provides an “escape lane” alongside the drive-through lane, so that people who decide not to order food can leave the site quickly instead of waiting in line. Ms. Kabo also pointed out on the site plan the directional signs, free-standing and painted on the ground, which would direct customers from the first curb cut, near the intersection of North Westland Drive and South Frederick Avenue, to the drive-through lane.

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<sup>16</sup> Ms. Kabo seems to have derived the 70-foot setback requirement from the center line of South Frederick Avenue from the requirements for the C-3 Zone, under Section 59-C-4.362, rather than the requirements for the C-2 Zone, under Section 59-C-4.353. This is puzzling, because in her testimony, Ms. Kabo correctly cited Section 59-C-4.353 as her source for setback requirements in the C-2 Zone. Nonetheless, it is clear from the text of the two sections in question that the C-3 Zone imposes a building setback requirement of 70 feet from the center line of any street right-of-way, if there is no master plan showing the right-of-way line, while no such requirement applies in the C-2 Zone. *Compare* §§ 59-C-4.362 and 59-C-4.353.



Ms. Kabo observed that currently, the subject site has no landscaping. She opined that the landscaping proposed by Taco Bell would improve the streetscape, and that plantings to the rear of the building would buffer the neighbors' view of the new building. Taco Bell's dumpster would be within the special exception area and fully enclosed by fencing and evergreens. The heating and cooling units for the building would also be screened by evergreens. With regard to buffering for the residential neighborhood to the east, Ms. Kabo noted that the owner of the shopping center has agreed to replace the dilapidated fence along the northern property line with a new wooden fence, 6 ½ feet high, meeting Code standards. Tr. Jan. 13 at 63. In addition, Taco Bell committee to plant evergreens between the four existing shade trees along the fence, which would be two feet in diameter and 15 feet in height at maturity (minimum of 5 feet at planting). Ms. Kabo estimated between two and four years for the evergreens to reach maturity, depending on the species. Petitioner proposes to consult with Technical Staff about which species to choose. Petitioner's counsel noted that the fence line is outside the special exception area, but that Taco Bell had worked out an arrangement with the landlord to do the proposed plantings.

Turning to site lighting, Ms. Kabo said that Petitioner's team worked extensively with Technical Staff on multiple revisions of the lighting plan. She stated that Technical Staff did not want any dark spots on the shopping plaza, for security reasons, but at the same time they wanted zero foot candles along the eastern property line and on North Westland Drive. Tr. Jan. 13 at 73-74. Ms. Kabo explained the various lighting fixtures, which include pole fixtures in the parking lot and along the drive-through lane, and wall-mounted fixtures on the building. Ms. Kabo further explained that the lighting levels shown on the photometric plan for the pole lights are not the same for all of the "A" fixtures because some are shown close enough to wall-mounted fixtures to affect the overall level of illumination. She also noted that the ballards shown on the site plan are just to protect the cars, they would not include lighting. Ms. Kabot stated that each Taco Bell lighting plan is different, because it depends on the surroundings. Sometimes the area already has so much lighting that Taco Bell does

not need to provide much. Here, Technical Staff requested that Taco Bell light the whole northern end of the shopping plaza, which Petitioner agreed to do.

Ms. Kabo opined that sound emitted from the speaker box where customers would place their orders would travel in a band about three to five wide, going out a distance of about 30 to 35 feet. Accordingly, the sound would die off before reaching the sidewalk. She based this opinion on the standards for the unit and testing of the unit, because they have had some issues with sites around the country. With the unit proposed here, even the car right behind the car placing an order cannot hear what the Taco Bell employees are saying. *Id.* at 86.

Ms. Kabo testified that the proposed development was designed to fit into the neighborhood and avoid impacts on the community. The building was located as far as possible from the residential area. The rear façade was designed to face the residential neighborhood, with no lighting and no building activities on that side. Truck deliveries take place during the morning, which avoids nighttime truck activity. The speaker post would face away from the residential community, directing noise away from the residences. The escape lane would speed up the process, reducing noise. All cars would be directed to enter the property using the western curb cut (closest to South Frederick Avenue), rather than the one closer to the residences. The building would incorporate a new heating/air conditioning system designed to prevent odors and fumes from leaving the building. Ms. Kabo finds the proposed buffering acceptable, and opined that the proposed use would satisfy all of the general and specific conditions for the use under Sections 59-G-2.62 and 59-G-1.21. She stated that the use “is designed to be completely in harmony with the surrounding area,” and will not increase the number, intensity and scope of special exceptions in the area. Tr. Jan. 13 at 92.

2. Mark Lubin, Taco Bell manager. Tr. Jan. 13 at 117 – 156.

Mr. Lubin is Director of Operations for Taco Bell corporate stores in the Baltimore-Washington area. He has worked for Taco Bell for more than 12 years. Currently, he is in charge of the overall physical operation of 27 company-owned Taco Bell restaurants in the Baltimore-Washington

area. The Taco Bell proposed here would be a company-owned store and, therefore, Mr. Lubin would be responsible for its operations.

Mr. Lubin testified that the proposed development would be a “multi-brand” restaurant comprised of Taco Bell and Long John Silver’s. He confirmed that the building proposed would be brick, to fit in with the rest of the shopping center, which is not the usual prototype for this kind of restaurant, and that less signage is proposed than normal. Mr. Lubin stated that he expects to have ten employees plus a manager on site at one time during the peak periods, although for the first few weeks he would need a slightly higher number of workers, until business dies down to a normal level. He described the peak lunch time as 11:00 a.m. to 2:00 p.m., and the peak dinner period from 5:00 to 8:00 p.m. He stated that Taco Bell also has a “late night” period from 9:00 p.m. to closing. During non-peak periods there would be four to six employees on site, plus a manager, and by the time they get to closing he would expect to need only three employees plus a manager.

Mr. Lubin stated that a drive-through window is a standard feature of these restaurants; all 27 of his stores have drive-throughs. He observed that the trend for hours of operation at drive-throughs is going to 24-hour operations. The earliest closing time Mr. Lubin has for the drive-through at any of his restaurants is about 2:00 a.m. Typically, the dining room closes a little earlier. At this location, Taco Bell proposes to close the dining room at 11:00 p.m. Sunday through Thursday, and midnight on Friday and Saturday. They originally suggested 4:00 a.m. for the drive-through, but decided to scale it back to 2:00 a.m. due to the circumstances of this site. Tr. Jan. 13 at 122.

Mr. Lubin described the order-taking process at Taco Bell, which has become more streamlined, with more technology and less verbal communication. Employees are now instructed to say only “Hi, how are you?” when a customer drives up, rather than the past practice of welcoming customers to Taco Bell and asking if they would like to try a particular menu item. After the greeting, the customer states what they would like, and the products appear on a screen in front of them. Instead of verbally repeating the order, the employee simply asks whether everything on the screen is correct. The only thing an employee will offer is a drink, if the customer doesn’t order one. Then the

employee tells them the total, and they proceed to the pick-up window. Mr. Lubin stated that the order confirmation board system is in use at a new Taco Bell in the Baltimore area, and has been effective. He described a situation where a Taco Bell in a residential area of Northern Virginia was having noise problems, and he put in a special request for an order confirmation board. Since the board was installed, Mr. Lubin has had no further complaints from residents. *Id.* at 124. In response to a question from a community member, Mr. Lubin stated that the order confirmation board was about 60 to 65 yards away from the closest residence. *Id.* at 148.

Regarding the speed of service, Mr. Lubin stated that his stores lately are running ahead of the target, getting people through at a faster pace. To help reduce the amount of time that cars would spend in line at the subject site, he offered to add a second drive-up window, called a “double bubble.” That would mean that a customer places his or her order, proceeds to the first window to pay and get condiments, then proceeds to the second window to pick up the order. This improves speed of service. *Id.* at 126.

Mr. Lubin described the policy of Taco Bell and its parent company, Yum! Brands, about patrolling the grounds to maintain a clean environment. He stated that there are four components to the cleaning program, a major element of which is “manager walks.” A manager is required to walk the inside and outside of the facility every 30 minutes, all day, walking the perimeter of the building and making sure that Taco Bell trash is not making its way into the general neighborhood. This would include picking up a cup that is closer to the 7-Eleven than to the Taco Bell.

With regard to loitering, Mr. Lubin described two approaches. The first is to communicate the company’s expectations to customers. If there is a lot of loitering outside a restaurant that can’t be controlled at the store level, Taco Bell will work with the police. They also find that piping low-level classical music outside the store tends to deter kids from hanging out there. Based on his experience, Mr. Lubin does not expect a problem with loitering at the proposed location, if the store is approved. He stated that typically, loitering is a problem where there is a bar nearby, and people leave the bar and hang out in the Taco Bell parking lot. When asked whether he thought the 24-hour 7-Eleven

store nearby could lead to loitering at the proposed Taco Bell, Mr. Lubin stated “when I personally go to 7-Eleven, I don’t necessarily see groups of people hanging outside of a 7-Eleven. I don’t go to that specific 7-Eleven, but I can only speak for the ones I do go to.” Tr. Jan. 13 at 128.

Mr. Lubin described the safety of customers and employees as the number one focus of Taco Bell and Yum! Brands. Security measures include not letting people enter and exit the building through the back door. The only thing that comes through the back door is restaurant deliveries. After dark, the back door does not open for any reason. In addition, no employee is ever in the building alone. There is always at least one manager and one employee. Also, once the dining room doors are locked at night, no one can enter or leave the building except at the beginning or end of a specific shift.

Mr. Lubin stated that he can control delivery times to the proposed location because there is only one approved distributor in the area for all Yum! Brands stores. In consultation with community members attending the hearing, he agreed to a condition that would limit deliveries to no more than three times per week, on weekday mornings, with trucks arriving no earlier than 8:00 a.m. and no later than 10:00 a.m. Tr. Jan. 13 at 182. Deliveries are made by tractor trailer truck. Mr. Lubin stated that on average, a delivery truck is on site for 35 to 45 minutes each time, if there is a store employee available to help unload. There usually is an employee available to help.

Mr. Lubin anticipates that trash pick-up would occur about two to three times per week. The dumpster would be the type that gets picked up by a big trash truck, emptied into the truck, and set back down on its pad.

In response to a question from a community member, Mr. Lubin stated that Taco Bell’s target for the amount of time a customer spends in line at the drive-through, from the time they get into line to the time they get their food, is three and a half minutes. He noted that cars can get backed up “if you don’t have the right people on your staff.” Tr. Jan. 13 at 138. He added that lines only back up during the peak lunch and dinner periods, not during the late-night hours. With regard to peak days of the week, Mr. Lubin stated that the busiest days tend to be Friday and Saturday. He noted that Taco Bell does have a breakfast menu, but it is not currently offered at any of the stores Mr. Lubin manages.

In response to a question from another community member, Mr. Lubin emphasized that the manager's clean-up responsibility during a "manager's walk" is not limited to a specific area or just trash with the Taco Bell name on it. The manager is supposed to ensure that the area around the store is free of trash, whether or not it came from Taco Bell. Mr. Lubin was, not surprisingly, a bit taken aback when he was asked whether the manager would dispose of the kind of bulky items that people leave next to the dumpster in the corner of the parking lot, like computer monitors and chairs. Mr. Lubin stated that he has never come across a computer monitor in any his stores' parking lots, but if it is safe for his employees to move something, they will do it. Tr. Jan. 13 at 145-46. If it is not safe and it's hindering traffic, he will get someone to remove it.

Mr. Lubin was not able to provide an estimate for the number of customers who go through a drive-through in a day, but he estimated that during a peak hour, they have about 30 to 35 cars come through. *Id.* at 150. He estimated that there would seating inside for 60 customers.

3. Carl Starkey, transportation planner. Tr. Jan. 13 at 156 – 180.

Mr. Starkey was designated an expert in transportation planning and traffic engineering. He testified that he has been involved in site planning for the proposed project and has evaluated compliance with transportation and Adequate Public Facilities guidelines. He concludes that the proposed development would not have an adverse impact on nearby traffic conditions, noting that the intersections studied would operate at a level of service of C or better with the proposed development. The intersections studied currently have levels of service ranging from A to C, and that range would stay the same.

Mr. Starkey explained that levels of service are described as A through F. A is the best operating conditions, E represents capacity, and F suggests failure. Tr. Jan. 13 at 160. At the subject site, the County has established the maximum acceptable critical lane volume ("CLV") as 1,475, which corresponds to a level of service of E.

Addressing specifically the intersection of North Westland Drive and South Frederick Avenue (MD 355), Mr. Starkey stated that the intersection currently operates at a level of service on the

cusps of A and B in the morning peak hour, and at a level of service of B in the evening peak hour. The proposed use would have no effect in the morning, because it would not be open during the peak period. Mr. Starkey found that with the proposed development, the level of service at this intersection would drop to C during the afternoon peak hour. Mr. Starkey stated that Technical Staff specifically requested that the safety of all turning movements be verified at this intersection and for the two site entrances, as well as for on-site circulation. He concluded that the geometry of the intersection of North Westland Drive and South Frederick Avenue is more than adequate to allow safe movements in all directions. *Id.* at 161.

Mr. Starkey presented accident data from SHA, for the years 2002 through 2004. During that three-year period, a total of 29 accidents were reported at the intersection of South Westland Drive and South Frederick Avenue, which has a traffic signal, and seven at the intersection of North Westland Drive and South Frederick Avenue, which does not have a traffic signal. *Id.* at 162. Mr. Starkey opined that in light of these statistics, he would not consider North Westland and South Frederick to be a high accident intersection. He observed that left turns can be safely made from southbound Rte. 355 onto North Westland Drive, which has a left-turn lane. In fact, he noted, the signal at South Westland Drive creates opportunities for such turns.

Mr. Starkey described the two proposed vehicular entrances to the subject site as typical commercial driveways, about 24 feet wide. He stated that the westernmost driveway would have directional signage and pavement markings telling customers to enter through that driveway and drive around the building to get in the drive-through lane, then exit from the same driveway. Mr. Starkey noted that although this maneuver looks a bit complicated on the site plan, it is easier than it looks. At Technical Staff's request, Mr. Starkey's company used turning templates to demonstrate that the necessary maneuvers could be made, and he reports that Staff was satisfied by that evaluation. Tr. Jan. 13 at 173.

One concern raised by community members is their observation that cars tend to exit the shopping center, turn right on North Westland Drive, and turn right on Walnut Hill Road to get to South

Westland Drive, at the other end of the shopping center, where they can enter Rte. 355 at a signalized intersection. Mr. Starkey does not expect the proposed development to direct traffic through the neighborhood. His firm did traffic counts at the intersection of Walnut Hill Road with North and South Westland Drive, and found that there were about 30 to 35 vehicles going through those intersections during the peak hour. He considers this in line with the number of homes in the area.

Regarding parking, Mr. Starkey stated that the Zoning Ordinance requires a minimum of 35 spaces for the proposed use, and there are approximately 77 parking spaces in the portion of the parking lot between the subject site and 7-Eleven. Mr. Starkey's firm conducted a parking accumulation study at the site, which indicated that the maximum existing parking demand was a peak of 35 spaces.

In response to additional community questioning, Mr. Starkey stated that he did not observe traffic patterns at other Taco Bell restaurants to observe how the traffic flows, e.g. whether drivers follow the signs.

### ***B. Opposition Testimony***

1. Bobbie Clements. Tr. Jan. 13 at 106-108.

Ms. Clements resides at 8903 North Westland Drive in Gaithersburg. Ms. Clements asked to confirm the South Frederick Avenue address that was given for the subject site. She noted that the 7-Eleven, the music store and the auto store on the lower level of the Walnut Hill Shopping Center are all listed in the yellow pages with addresses on North Westland Drive. See yellow pages excerpt at Ex. 45. Ms. Clements wanted to know whether there would be a Taco Bell with an address on her street. Tr. Jan. 13 at 106-107.

Taco Bell's Mr. Lubin and its counsel stated that to the best of their knowledge, the post office address for the subject site is North Westland Drive, which was the address used by the former bank at that location.

2. Doug Hill. Tr. Jan. 13 at 109-110; 211-235.

Mr. Hill resides at 11607 Chestnut Street in Gaithersburg. He asked whether the shopping center landlord has agreed to move the dumpster that is currently located in the northwest



corner of the parking lot, next to the proposed Taco Bell drive-through lane, and if so, where. Tr. Jan. 13 at 109-110. He also asked what plans had been made to protect a fire plug located in the same area from overgrowth of the new plantings Taco Bell has proposed. Petitioner's site planner, Ms. Kabo, stated that she would have to investigate the location of the fire plug, which had not been raised before.

Mr. Hill also addressed safety issues related to the proposed drive-through. Tr. Jan. 13 at 212-213. He maintained that despite what the traffic study said, traffic from the shopping center does turn right onto North Westland Drive, then right on Walnut Hill Road, then right again on South Westland Drive to access Rte. 355 at a traffic light. Mr. Hill argued that drivers parked in the lower level parking lot, in front of the 7-Eleven, do not like to drive through the shopping center parking lot to reach South Westland Drive, for two reasons: the shopping center parking lot is fairly busy, and going from the lower parking lot to the upper lot requires negotiating a hairpin turn, with a change in grade, to get around the landscape island that separates the two. Mr. Hill maintained that the intersection of North Westland Drive and South Frederick Avenue has several problems: there is a downhill grade coming to the intersection, making it difficult to judge speed; the speed limit is 40 miles an hour, unlike Rte. 355 farther north, where there are other fast food restaurants and a 30-MPH speed limit; anyone turning left from North Westland Drive onto Rte. 355 blocks the view of anyone waiting to turn right; and there are a large number of curb cuts for the gas station on the northwest corner, the Italian restaurant, and a Goodwill store located just north of the Italian restaurant. *Id.* at 216.

Mr. Hill noted that there is a middle school bus stop on the corner of South Westland Drive and Walnut Hill Road, so there are children walking from the neighborhood to that location. He speculated that if the proposed use is approved, "breakfast burritos" won't be long in coming, and the neighborhood will have to deal with morning traffic as well as the rest. Mr. Hill anticipates that if the Taco Bell is approved, customers arriving from southbound Rte. 355 ( who don't want to wait to turn left onto North Westland Drive) will avoid the front of the shopping center and the hairpin turn by using South Westland Drive to get to Walnut Hill Road, then turning left on North Westland Drive and left into the parking lot. *Id.* at 228-230.

Mr. Hill noted that the auto parts store/repair shop two doors down from the 7-Eleven has a mechanic on staff only periodically, and when it does, it opens up the one service bay for limited repair work. He stressed that this shop is not a full-service auto repair place. He also observed that the 7-Eleven, the music store and the auto shop are below grade, which contains their noise to some extent, whereas the proposed Taco Bell would be at grade.

Mr. Hill observed that the drivers of large trucks frequently come to the 7-Eleven at this location and park their rigs in the parking lot drive aisle, parallel to North Westland Drive (the parking spaces are perpendicular to North Westland Drive, and too small for a large truck). *Id.* at 214-215. He testified that he observed the lower parking lot on the morning before the hearing, and within five minutes he saw a WSSC (Washington Suburban Sanitary Commission) truck exit the parking lot and turn right on North Westland Drive. He actually filmed the event, although he was not able to follow the truck after that to see whether it turned onto Walnut Hill Road. The video was played at the close of the hearing, and showed a truck pass in front of the 7-Eleven, exit through the eastern curb cut and turn right onto North Westland Drive. The video also showed one large truck and one medium-sized truck parked parallel to North Westland Drive in the parking area in front of the 7-Eleven, and a lot of big trucks parked on the street on North Westland Drive, abutting the subject site. See Ex. 56, described by Hearing Examiner for the record in Tr. Jan. 13 at 265-66. Mr. Hill finds that the easternmost driveway from the subject site already has multiple uses, and that adding Taco Bell customers, and a drive-through lane, would create conflicts and safety issues. *Id.* at 232.

Mr. Hill provided data from the web site for Gaithersburg High School, located about half a mile north on Rte. 355, which states that the school has a population of 2,200 students, all of whom have the same lunch period (10:51 to 11:34). See Exs. 53 and 54. Students in 10<sup>th</sup> through 12<sup>th</sup> grades have an open lunch, allowing them to leave the school for lunch. The school policy states that overcrowding of cars will not be permitted, and that students are not permitted to cross Rte. 355 on foot. See Ex. 54. Mr. Hill stated that the cafeteria can seat only 400 students, and others who do not leave school for lunch have to eat in the hallways. He stated that currently, 191 student cars park at the

school, a large number of which leave for lunch. He referred to a study conducted by the University of North Carolina Medical School, which found lunchtime crash rates to be about three times higher in counties with open school lunches than in counties without. Tr. Jan. 13 at 223.

Mr. Hill believes that a Taco Bell at the proposed location would create additional risk for students at Gaithersburg High School because some students would attempt to turn left onto North Westland Drive to get lunch at the Taco Bell, with the 40-MPH speed limit and no traffic light. He considers this dangerous, given the speed of traffic coming down the hill on Rte. 355, as well as shopping center patrons waiting to turn left onto Rte. 355. Petitioner's traffic study did not examine lunch time traffic, so the community decided to do it. [See testimony of Louis Conter, below, re: methodology.] Based on counts that were taken at lunch time on Wednesday, January 11, 2006, Mr. Hill stated that 104 cars turned left in an hour from southbound Rte. 355 onto North Westland Drive. Tr. Jan. 13 at 227. In addition, 40 cars turned left from North Westland Drive onto Rte. 355 during that same period. In addition to teenage drivers trying to make that turn, Mr. Hill is concerned that high school students might take the bus down from school, getting off at a bus stop that is across from the gas station on the northeast corner, and, under a tight deadline to get back to school, take a chance on crossing Rte. 355 on foot, without the benefit of a traffic light or a crosswalk.

Mr. Hill complained that the 7-Eleven has two dumpsters in the corner of the parking lot nearest to the proposed drive-through lane, which block a fire hydrant. He stated that their lease does not permit those dumpsters, but it is not enforced. Mr. Hill also complained that North Westland Drive has become a parking lot for commercial vehicles, despite repeated complaints.

3. Fran Monblatt, Tr. Jan. 13 at 111-114.

Ms. Monblatt lives at 112 Goucher Terrace, Gaithersburg, and is president of the Gateway Community Homeowners Association. She testified that her community is accessed off of South Westland Drive, at the south end of the Walnut Hill Shopping Center. Ms. Monblatt explained that most of the original homeowners in her community bought their lots off of a draft master plan, which did not show the Summerfield Suites hotel that has since been built abutting parts of their

community, or the large storage building, the Food Lion, or other uses. Ms. Monblatt noted that the proposed Taco Bell would be about one block's distance from the Summerfield Suites, and her community is concerned that it would draw people staying at the Summerfield Suites, causing noise and traffic late at night, as well as trash problems. They already have problems with people loitering near the Summerfield Suites entrance with liquor bottles. Finally, Ms. Monblatt expressed her community's increasing frustration with the level of commercial development in the area, which brings unwanted noise and trash.

4. Leo Kabatt. Tr. Jan. 13 at 183.

Mr. Kabatt, who resides at 16545 South Westland Drive, Gaithersburg, is president of the Walnut Hill Homeowner's Association, although he testified on his own behalf. He quoted Planning Board Chairman Derick Berlage as stating, at the hearing on this case, that he "can't imagine a worse place to put a drive-through restaurant." Tr. Jan. 13 at 183. Mr. Kabatt agreed with that sentiment. He stated that there is already loitering in front of the 7-Eleven, adding that residents believe the proposed Taco Bell would attract students from nearby Gaithersburg High School. He concludes that the proposed development would do more harm than good.

5. Louis Conter. Tr. Jan. 13 at 184 – 204.

Mr. Conter made a presentation designed to refute Petitioner's contention that the area of the subject site has a need for drive-in restaurants, as well as Technical Staff's conclusion that there is a dearth of Mexican restaurants in zip code 20877.

Mr. Conter began with the definition of the "market" used in Petitioner's Proof of Need Analysis, Exhibit 13(a), which Mr. Conter believes understates the number of drive-through restaurants in the area. Petitioner's study defined the market area as the area within a four-minute drive of the subject site, and identified only two drive-through restaurants within that area. Mr. Conter proffered a map of the area (downloaded from Google) on which he had identified the locations of all quick-serve (fast food) restaurants with drive-through service, as well as the market area defined in Petitioner's Proof of Need Analysis. See Ex. 47(a). To test the validity of this market area definition, Mr. Conter

drove four minutes from the subject site in each direction. He found that within four minutes, he reached several drive-through restaurants that Petitioner claimed were outside a four-minute drive. He found that there are eight drive-through restaurants within four minutes' drive, not two. See Exhibit 47(b). On this basis, he concludes that the area is adequately served by drive-through restaurants. Tr. Jan. 13 at 190.

Mr. Conter testified that he did the driving he described on Tuesday, January 10, 2006 at 6:30 p.m., in rush hour traffic, and again on Thursday, January 12, 2006 at 4:30 p.m. He stated that he drove through the parking lot of each of the restaurants, and his drive times are listed on Exhibit 47(c).

Turning to Technical Staff's review of Petitioner's Proof of Need Analysis, Mr. Conter noted that Staff identified 94 restaurants in the zip code that includes the subject property, and found that among those restaurants there was a dearth of Mexican food, especially quick-serve. Tr. Jan. 13 at 194. Mr. Conter proffered a copy of an email that he received from Technical Staff describing database research underlying their analysis. See Ex. 48. Staff identified 94 restaurants in the zip code they selected, including six Mexican restaurants. Mr. Conter pointed out that six restaurants represent 6.5 percent of the total restaurant population, which he does not believe constitutes a "dearth" of Mexican cuisine. Moreover, Mr. Conter's research suggests that there are more than six Mexican restaurants in the 20877 zip code.

Mr. Conter went into the database that Dr. Akundi had used, and was able to find more detailed information on each entry, including lines of business and contact information. He noticed that some restaurants listed specific lines of business, like "Tex-Mex," and others just listed "restaurant." Mr. Conter then telephoned every restaurant on the list that had a Spanish name, and asked what kind of food they serve (he did not call one restaurant where he had eaten, and which he therefore knew serves Mexican food). If the person answering did not readily respond, he followed up by asking "Latin American?" At least one restaurant that described itself as Mexican on the phone was listed in the database as a Chinese restaurant.

Based on Mr. Conter's research, he concluded that there are 11 Mexican restaurants in the 20877 zip code, representing more than 12 percent of the total restaurant population. This is more than the percentage represented by Chinese restaurants, or restaurants that say they serve pizza. Mr. Conter argues that Technical Staff used an inaccurate database and did sloppy work by not pursuing it farther than a secondary search, so their conclusion should be discounted.

Mr. Conter described an additional piece of research that he did, which was to search Taco Bell's website for restaurants near the subject site. He came up with four Taco Bell drive-through locations within five miles of a zip code about a mile away from the subject site. Tr. Jan. 13 at 201-202; 237. Mr. Conter used the zip code for the County's waste transfer station, which is a very small zip code and very centralized. He felt that this would provide representative information about which Taco Bell restaurants were closest to the subject community. *Id.* at 237-38.

In Mr. Conter's view, the area is well served by both Mexican restaurants and quick-serve restaurants.

On cross-examination, Mr. Conter conceded that he did not search for seafood restaurants, although the proposed use would have a Taco Bell and a Long John Silver's restaurant serving seafood. He explained that he focused on refuting Technical Staff's conclusions, and they did not address seafood restaurants. Mr. Conter also acknowledged that he does not know if any of the Mexican restaurants he identified have drive-through facilities. Again, Technical Staff's conclusion did not focus on that, so neither did Mr. Conter.

Mr. Conter also conducted lunch time traffic counts to support the testimony of fellow community member Doug Hill. He explained that initially, he was trying to test the accuracy of the traffic study. He positioned himself in a car in the shopping center parking lot, in the second set of parking spaces, about 45 feet from the sidewalk on North Westland Drive and 70 feet from the sidewalk along South Frederick Avenue. Tr. Jan. 13 at 239-240. He counted the number of cars that made a turn at the intersection of North Westland Drive and South Frederick Avenue for one hour during the peak period identified in the traffic study (4 to 7 pm), and found that his total was within two cars of the

number reported in the traffic study. As a result, he concluded that the traffic study was accurate on that point. Later, on Wednesday, January 11, 2006, he used the same methodology to get a count of turning movements at lunch time. Mr. Conter did a count for 45 minutes, from 11:40 to 12:25, and extrapolated it to approximate a one-hour period (he divided the total by three and multiplied that amount by four). The result was an estimate of 104 turning movements at the intersection during a one-hour period at lunch time.

Mr. Conter also prepared a drawing that attempted to superimpose the proposed Taco Bell building on the existing bank building, to show the larger footprint now proposed. (This drawing was offered into evidence by community member Albert Parr. See summary of testimony below.) Mr. Conter stated that he took the size of the existing building from the topographic survey. Because the scale on that drawing is different from the scale on the submissions that show the new building, he approximated the size of the new building. Knowing that each parking space is shown on the site plan as 19 feet deep, Mr. Conter measured the proposed building, which is shown as 38 feet by 82 feet, as two parking spaces wide and a bit over four parking spaces long. Tr. Jan. 13 at 253. He also used other known distances, such as the ten-foot escape lane and the three-foot buffer along North Westland Drive, to develop dimensions. Mr. Conter's drawing indicated that the proposed building would have a larger footprint than the existing building, and would block more of the lower level shopping center frontage from view than the existing building. *Id.* at 256.

Following an objection by Taco Bell's counsel as to the accuracy of the proposed drawing, and an offer to have Taco Bell produce a similar drawing that would be to a set scale, the Hearing Examiner did not admit Mr. Conter's drawing into evidence. See Ex. 60 (f) for Taco Bell's drawing superimposing the proposed building on the old.

6. Katie Shea. Tr. Jan. 13 at 148-149, 205 – 211.

Ms. Shea resides at 16716 Shea Lane in Gaithersburg. Following up on Mr. Conter's testimony about need, Ms. Shea testified that using the websites of several fast food chains (McDonald's, Wendy's, Burger King, Popeye's, Taco Bell, Kentucky Fried Chicken and Roy Rogers),

she identified 38 drive-through restaurants within five miles. In addition, by “googling” the words “taco” and “Mexican,” she found 12 restaurants within five miles that had at least one of those words in its name.

Ms. Shea went on to state that her main concern is with the proximity of the subject site to a residential neighborhood, which she described as unprecedented in this County. Tr. Jan. 13 at 206. Ms. Shea testified that she drove to each of approximately 30 drive-through restaurants in the area, and found that not one is close to single-family homes. She found several that are fairly close to rental properties, but not as close as the proposed Taco Bell would be to the homes of Walnut Hill. Ms. Shea acknowledged that there is a Taco Bell near the Montgomery County Airpark that is close to a single family home, but the parking lot is over 150 feet from the nearest home. Ms. Shea notes that the Taco Bell building proposed here would be 150 feet from the nearest home, but the drive-through lane and parking would be much closer. She observed that at the northern Virginia location where Mr. Lubin testified about noise problems, the order confirmation board was between 195 and 240 feet away from the nearest home; at the subject site, the order confirmation board would be approximately 127 feet from the nearest building on a residential property.

On cross-examination, Petitioner’s counsel pointed out that Ms. Shea had cited the distance estimate from the northern Virginia site incorrectly, although counsel’s (and Mr. Lubin’s) recollection of Mr. Lubin’s testimony slightly underestimated the distance he had described. With the benefit of the transcript, the Hearing Examiner finds that Mr. Lubin estimated the distance between the order confirmation board and the nearest home at about 60 to 65 yards, or 180 to 195 feet. See Tr. Jan. 13 at 148.

7. Pamela Cook, Tr. Jan. 13 at 243-246

Ms. Cook lives at 8324 North Westland Drive, the house closest to the subject site, and has lived in Walnut Hill for over 25 years. She explained, in response to the Hearing Examiner’s question, that the buildings on her property and her next-door neighbor’s property that are closest to the



fence are garages. The houses are closer to Walnut Hill Road, with the garages sitting between the houses and the shopping center parking lot.

Ms. Cook noted that her property line is approximately 22 feet from the existing shopping center driveway closest to her home, and the proposed building would be only about 100 feet from her home. She stated that the only existing buffer is a wooden fence and some trees, most of which are dead. She feels that a drive-through restaurant so close to her home would disrupt her family's life and take away their ability to peacefully enjoy their property. She expects that Taco Bell would not be a good neighbor, and that there would be increased loitering, which is already a problem, as well as more traffic and more trash "for the sweeper to push out into the street and blow into our yards." Tr. Jan. 13 at 244-45. Ms. Cook described the current loitering problem as mainly day-laborers who don't get work, hanging out on the steps near the 7-Eleven all day.

Ms. Cook believes that the late hours Taco Bell proposes would cause her family sleepless nights of tires screeching, loud music rattling the windows and loud conversations. She stated that these problems already occur from time to time, and she expects they would be more frequent with the proposed Taco Bell. She also feels uncomfortable with the idea of dozens of people an hour passing by her bedroom window, which is only 65 feet from the closest driveway, stating "I'm sure that most of these people are good, honest people, but I'm afraid that some of them being out at that time of night are looking for trouble, and will wander into our neighborhood." *Id.* at 245. Ms. Cook stated that the shopping center has always been a nuisance, but her family has lived with it for a long time. If a Taco Bell is built, with a drive-through, she thinks it would be so unbearable they would have to move, but who would buy their home, with "a Taco Bell in their front yard?" *Id.*

8. Albert Parr. Tr. Jan. 13 at 246-252.

Mr. Parr lives at 16604 South Westland Drive in Gaithersburg, which he describes as not up against the fence abutting the shopping center, but very close. He pointed out page seven of the Staff Report, which states that the residential block backing onto the Walnut Hill Shopping Center was mistakenly assumed to be commercially zoned land when the shopping center was developed in the

1960s. As a result, no buffer was required between that land and the shopping center. Mr. Parr argued that approving the special exception requested here would further aggravate a past zoning error and compound the problems for the neighboring residents.

Mr. Parr maintained that Petitioner has not carried its burden of proof to demonstrate that the proposed facility will not adversely affect the character of the neighborhood. He agreed with the Planning Board that after an assessment of all the factors, the special exception should not be granted, especially with Taco Bell's refusal to reduce the hours to what Technical Staff suggested.

Mr. Parr testified that he walks in the neighborhood every morning, and rides his bicycle every evening. As a result, he sees the traffic on Walnut Hill Road, and he knows which cars belong to the neighbors and which are shopping center traffic using Walnut Hill Road to get to the traffic light. He thinks that this sort of traffic late at night is just not acceptable.

Mr. Parr also addressed the Zoning Ordinance requirement, in the specific conditions for a drive-in restaurant, that the proposed building must not significantly block the view of any existing retail establishment from the major street. Mr. Parr maintained that the proposed Taco Bell would have a footprint about twice the size of the existing building, and would significantly block the view of the lower level stores from North Westland Drive, which is the street these uses are located on. He offered into evidence a drawing that Mr. Conter had made, which attempted to superimpose the proposed Taco Bell building on the existing bank building. See Conter testimony, above, for discussion.

Finally, Mr. Parr suggested that if the site is messy, as Taco Bell claims, it should be straightened up by ordinary legal means, not by imposing unpleasant development.

9. Kathryn George. Tr. Jan. 13 at 257-58.

Ms. George lives in the Rosemont community, across Rte. 355 from the subject site. She testified, on behalf of herself, her mother, and a couple of neighbors, that the proposed use would attract too much traffic too close to a residential area, particularly with the proposed late night hours of 2:00 a.m. She suggested that a quieter business with shorter hours would be more appropriate.

***C. Applicant's Rebuttal*****1. Mark Lubin, Taco Bell manager. Tr. Jan. 25 at 6 - 28**

Mr. Lubin identified, on a new building elevations drawing, the pre-pay window that was added to the plans after the first hearing day. He stated that at a typical Taco Bell, all the transactions between employee and customer happen at one window – cash handling, handing out food and drinks, handing out condiments, and related conversation. With a pre-pay window, those functions are spread out, which increases the efficiency of employees. At the first window, the customers pay for their food and receive a receipt, condiments, napkins, straws, etc. At the second window, the only thing that happens is that the customers receive their food. This allows employees to be more efficient and speeds up the process, so cars spend less time in the drive-through lane. Typically, the pre-pay window would be open only during peak periods, unless the store has a very high volume. In general, only one window would be open during late night hours, when volume is slower.

Mr. Lubin testified that in addition to controlling the timing of deliveries, he can also control the routes taken by his delivery trucks. He provided assurances that if the proposed special exception is approved, Taco Bell delivery trucks will not travel through the neighborhood. Tr. Jan 25 at 8-9.

Turning to the list of Mexican restaurants that was discussed during the first hearing day, Mr. Lubin stated that none of them are similar to the proposed Taco Bell because they are not quick service restaurants. Based on 15 years' experience in the quick-service restaurant industry, as well as his experience as a customer in both quick service and casual dining restaurants, Mr. Lubin considers the restaurants on the list to be casual dining restaurants, where the customer expects a totally different dining experience. Taco Bell provides counter service and very low prices – the average check is about \$5.70. A casual dining restaurant provides table service, with higher prices. The timing is also very different. Taco Bell aims for no more than three and a half minutes between the time the customer gets in line at the drive-through and when they receive their food. A casual dining experience does not work that way; one can easily wait 30 minutes for the meal to be served. Mr. Lubin opined that reviewing the

number of casual dining restaurants in the area is not the way to assess the need for the proposed Taco Bell. Accordingly, he concluded that Technical Staff was correct in excluding casual dining restaurants from the need analysis.

With regard to testimony about illegal parking on North Westland Drive, Mr. Lubin stated that Taco Bell does not want anything that will visually detract from the area. In some situations, they have partnered with the police to address situations like illegal parking. Sometimes a simple phone call is enough, but usually it requires a long-term partnership with the police, which Taco Bell is willing to do.

In response to a question from the Hearing Examiner, Mr. Lubin stated that the phrase "quick service restaurant" refers to fast food restaurants, not just drive-throughs. In response to a question as to whether Taco Bell would agree to the reduced hours recommended by Technical Staff (closing the drive-through at 11:30 p.m. Sunday through Thursday and 12:30 a.m. on Friday and Saturday), Mr. Lubin testified that he cannot agree with that for competitive reasons. Other fast food restaurants in the area are open until 2:00 a.m., and the average store in his portfolio closes between 2:00 and 4:00 a.m. To stay competitive and to be consistent with the Taco Bell structure, he would prefer for the store to be open until 4:00 a.m. In this situation, he is willing to agree to 2:00 a.m. *Id.* at 14-15.

Under cross-examination by a community member, Mr. Lubin reviewed the list of restaurants Technical Staff had developed, and stated that he recognized only one of the Mexican restaurants (Chipotle's) as a quick-service restaurant. There were others that he has never heard of. He noted that Chipotle's, a Mexican fast-food chain, is a competitor, but he has never seen a Chipotle's restaurant with a drive-through. He added that he considers the prime competition for the proposed restaurant to include Mexican fast-food restaurants such as Chipotle's and Baja Fresh, but also other quick service restaurants such as Wendy's, Burger King and McDonald's, which offer a similar experience. *Id.* at 25. He noted that he considers quick service restaurants to be competitors whether or not they have a drive-through.

2. Bharat Parikh, Taco Bell construction manager.

Mr. Parikh manages the site selection and construction of Taco Bell restaurants in the Baltimore/Washington Metropolitan area. He testified that he reviewed the map that Mr. Conter provided of existing quick service restaurants in the area of the subject site and independently assessed its accuracy. To do this, he drove around with a GPS (Global Positioning System) device trying to find the locations identified. He located 23 of the 27 listed, and stated that all of them were in different locations from what is shown on the map. In addition, two do not have drive-throughs and one is a Krispy Kreme store, which “is not a food choice.” Tr. Jan. 25 at 31. Mr. Parikh reviewed individually each of the locations that he found inaccurate, and the ones that he could not find. Where he found the locations inaccurate, they were off by one or two blocks. The Hearing Examiner observes that the level of inaccuracy was minor, and in no case did it make any difference as to whether the restaurant was within the four-minute drive time estimated by Petitioner’s Proof of Need Analysis or by Mr. Conter.

Mr. Parikh also tested some of the drive times to the restaurants inside the ellipse that Mr. Conter identified as within a four-minute drive. He did not drive to all of the restaurants, but he drove to some, and found that it took him longer than four minutes in both directions – from the subject site to the restaurant, and from the restaurant to the subject site. The drive times Mr. Parikh testified to are summarized below:

<b>From</b>	<b>To</b>	<b>Drive Time</b>
Kentucky Fried Chicken Gaithersburg, across from Popeye’s	Subject Site	5 min. 30 sec.
Popeye’s in Gaithersburg	Subject Site	5 min. 11 sec.
Subject Site	McDonald’s Near KFC across from Popeye’s	5 min. 23 sec.
Subject Site	McDonalds on Shady Grove Rd., inside Rte. 370 loop	7 min. 21 sec.
McDonalds on Shady Grove Rd., inside Rte. 370 loop	Subject Site	5 min. 50 sec.
Subject Site	McDonalds on Shady Grove Rd., inside Rte. 370 loop (2d time)	4 min. 58 sec.
Subject Site	McDonald’s in Derwood, next to Wendy’s	6 min. 10 sec.

McDonald's in Derwood, next to  
Wendy's

Subject Site

4 min. 58 sec.

Based on his drive times, Mr. Parikh agreed with Counsel's suggestion that the restaurants shown within Mr. Conter's ellipse but outside Petitioner's proposed market area are properly excluded, because it takes longer than four minutes to get to them from the site and vice versa. Tr. Jan. 25 at 38. He noted that the difference in drive times for the two times he went from the site to the McDonald's on Shady Grove Road demonstrates that it varies depending on traffic signals.

3. Carl Starkey, transportation planner. Tr. Jan. 25 at 51 – 62.

Mr. Starkey testified that he considered Mr. Conter's count of 104 cars turning left from southbound Rte. 355 to North Westland Drive during a one-hour period at lunch time to be a reasonable volume. He compared this volume to Petitioner's study, which found that the volume for that turning movement was 117 in the morning peak hour and 129 during the evening peak hour. He concludes from the count of 104 turning movements that it is possible to make that turn. Moreover, Mr. Starkey estimated that the northbound traffic volume on Rte. 355 -- the flow of traffic that southbound drivers have to wait for to turn onto North Westland Drive -- is about half as great at lunchtime as it is during the evening peak period. With lower volumes heading north, there would be greater opportunity to make that left turn onto North Westland during lunch time than in the evening.

Mr. Starkey stated that the intersection of North Westland Drive and Rte. 355 is safely designed, with a median, a left turn lane for southbound vehicles and adequate sight distance. Moreover, based on the accident data from SHA indicating only two accidents per year, Mr. Starkey does not consider this a high accident location. Tr. Jan. 25 at 53.

Mr. Starkey opined that not all of the students at Gaithersburg High School would come to the proposed Taco Bell for lunch. He assumed that not all of the students have vehicles, and that there are other lunch opportunities north of the school, so not all students would change their patterns to come to this Taco Bell.

Reviewing the turning movement data that were collected as part of his firm's traffic study, Mr. Starkey estimated that approximately five percent of the cars turning from Rte. 355 onto North Westland Drive during the evening peak hour turn right on Walnut Hill Road, and about eight percent in the morning. *Id.* at 55. Mr. Starkey infers from this data that most of the cars turning onto North Westland go into the shopping center, and that if they were using Walnut Hill Road when they leave, the turning volumes onto Walnut Hill Road would be higher. As shown in his traffic study, 166 cars turned from Rte. 355 onto North Westland Drive during the morning peak hour. See Exhibit 13(b) at 7. Of the 166, 11 went straight past Walnut Hill Road and 12 turned right onto it. The rest must have entered the shopping center or one of the businesses on the north side of North Westland Drive.

Under cross-examination by Mr. Hill, Mr. Starkey acknowledged that he does not have any data for the number of cars exiting the shopping center onto North Westland Drive. He explained that LATR standards did not require analysis of driveway traffic. He acknowledged that cars entering the shopping center during the peak hour may have gone out at the other end, or stayed in the shopping center until after the peak hour was over. Mr. Starkey conceded that the only way to determine explicitly how many cars turned right out of the shopping center and also turned right onto Walnut Hill Road would be to do a license plate survey, recording the license plate number of every vehicle turning right out of the shopping center and every vehicle turning right onto Walnut Hill Road, then comparing the two. *Id.* at 61-62.

***D. People's Counsel,*** Tr. Jan. 25 at 62-73.

The People's Counsel for Montgomery County, Martin Klauber, delivered a closing statement with a theme styled on Taco Bell's slogan: "They thought out of the bun, but not out of the building." Mr. Klauber argued that the proposed special exception should be denied on several grounds, primary among them Petitioner's failure to offer any probative, substantial evidence regarding inherent and non-inherent adverse effects.

Mr. Klauber requested that the Hearing Examiner take official notice of his memorandum dated July 11, 2003 to the Director of the MNCPPC, which addressed the standard of review under

Section 59-G-1.21 of the Zoning Ordinance (the Hearing Examiner hereby takes official notice as requested). Mr. Klauber described the contents of the memorandum, which encloses three special exception opinions issued by the Board of Appeals and one Hearing Examiner's Report and Recommendation in a special exception case.<sup>17</sup> He then quoted from the memorandum as follows: "I am authorized by the Board to state that together, these opinions constitute the standard of review that has been adopted by the Board in order to make the requisite findings required by this section of the zoning ordinance." Tr. Jan. 25 at 63-64. Mr. Klauber explained that the memorandum recited the names of the Board of Appeals opinions and referred specifically to the following language from the Hearing Examiner's report: "Technical Staff has identified operational characteristics that can turn an inherent adverse effect into a non-inherent one." Tr. Jan. 25 at 64. This, Mr. Klauber argued, is what has happened in this case. Inherent adverse effects have turned into non-inherent ones that justify denial of the petition.

Mr. Klauber noted that the only analysis of inherent and non-inherent adverse effects in the record is in the Staff Report, and even that fails to actually make a conclusion about whether there are any non-inherent adverse effects that justify denial. Mr. Klauber noted that Staff considered the proposed hours of operation unacceptable, quoting the Staff Report:

However, staff is of the opinion that the hours of operation in special exception cases such as this should be determined on a case-by-case basis. In the case of the subject application, given the location of the restaurant on the C-2 zoned shopping center property, and in view of the fact that there is an existing 24-hour convenience store at the same general location, the proposed hours of operation for the subject drive-through restaurant will not be compatible with the adjoining residential neighborhood to the east."

*Id.* at 65, quoting Staff Report at 19. Mr. Klauber notes that Staff then recommends shorter hours of operation, and states that:

Staff believes that these hours of operation are appropriate given the close proximity of the proposed restaurant to a residential neighborhood. It is also staff's opinion that hours of operation that are longer than the ones recommended by staff, coupled with the existing 24 hours [sic] operation of the convenience store, would create incompatibility in land use that would cause harm and disturbance to the adjoining residential properties.

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<sup>17</sup> BOA Opinion in S-2492, Omni Point Communications; S-2457, Harbor School; and S-2510, Hall and Post; and Hearing Examiner's report in CBA-1201-A.



Tr. Jan. 25 at 64-65, quoting Staff Report at 19-20. Mr. Klauber maintained that Staff's conclusion was not contravened by any of the testimony or other evidence presented by the Petitioner.

Mr. Klauber identified several additional deficiencies in Petitioner's case:

1. Only conclusory evidence about the impact on nearby residents of exhaust fumes from cars in the drive-through lane, nothing probative.
2. No probative evidence or testimony from the landlord stating that the fence buffering the residential community would be replaced.
3. No evidence as to whether the glare of headlights from cars turning into the drive-through lane would be blocked by the fence.
4. No substantive evidence as to whether proposed site lighting would create glare that would be visible from nearby residences.
5. No evidence presented to refute testimony from the community about parking and traffic patterns in the shopping center parking lot. No evidence describing the current parking and traffic patterns in the shopping center and how they would be affected by the proposed use. No evidence as to how use of the curb cuts would be safely controlled for the users of the Taco Bell and the shopping center.
6. Elevations showing the proposed buildings do not show any of the nearby residences to provide context.
7. Nothing provided to address how the Board of Appeals can impose a condition on a piece of land, i.e. the construction of a solid fence abutting the nearby residences, when that land is not under Petitioner's control.
8. The only evidence to refute community concerns about loitering was Mr. Lubin's opinion that it would not be a problem, but he offered no probative evidence of his familiarity with the nocturnal characteristics of the area, so his opinion is not probative.
9. No evidence about the combined impact of late hours for the Taco Bell and 24-hour operation of the 7-Eleven.

10. A Proof of Need Analysis that is based on a single important premise – the definition of the market – for which no rationale is provided. Why was a four minute drive chosen to establish the market area? Why not seven minutes, or five or ten? How can a market area be established based on the intangibles of driving conditions and traffic lights? Without anything in the record to back it up, Mr. Klauber argued that the four-minute drive time and everything based on it is meaningless. He also suggested that Technical Staff’s responsibility was to analyze Petitioner’s Proof of Need Analysis, not to perform their own independent research. Mr. Klauber noted that there is a series of judicial decisions regarding how to demonstrate community need for a gas station, and they should be considered in this context as well. See *Lucky Stores, Inc. v. Board of Appeals of Montgomery County*, 270 Md. 513 (1973); *Friends of the Ridge v. Baltimore Gas and Electric Co.*, 120 Md. App. 444, 707 A.2d 866 (1998); *Neuman v. City of Baltimore*, 251 Md. 92 (1968). He maintained that Petitioner should have either made a showing of how its Proof of Need Analysis was consistent with that line of cases, or demonstrated why a lesser needs analysis is appropriate in this case. Mr. Klauber argued that the Petitioner’s Proof of Need Analysis is so deficient, the special exception should be denied on that basis alone.

Mr. Klauber noted that the lease limits are very important in this case, because they reflect Petitioner’s inability to control the buffer area or the shopping center circulation patterns. In essence, he stated, Petitioner has failed to cure basic constraints of the site. Mr. Klauber concluded by stating that Petitioner has failed in its burden of proof to provide evidence and testimony supporting positive findings concerning the general conditions applicable to all special exceptions, and therefore the special exception should be denied.

## **V. CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context, because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a “preponderance of the

evidence” standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed special exception would not satisfy the specific and general requirements for the use.

### ***A. Standard for Evaluation***

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a drive-in restaurant. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Physical and operational characteristics associated with a drive-in restaurant include a commercial building, parking facilities, lighting, a drive-through lane and associated facilities such as a place to order food and pick it up, noise generated by vehicles using the drive-through lane, and vehicular trips to and from the site by patrons and employees.

Despite the statement by Petitioner's counsel in her closing argument that the Petitioner had presented evidence regarding inherent and non-inherent adverse effects, the Hearing Examiner was unable to find any in the record. Technical Staff listed several characteristics that should be considered inherent in this type of special exception, but neither Technical Staff nor Petitioner's site planner offered an opinion as to whether the use proposed in this case has any non-inherent characteristics. Petitioner's counsel, Erica Leatham, relied heavily on the argument that a special exception is presumed to be compatible in the zones where it is permitted. She is, perhaps, overlooking the language of Section 59-G-1.21(a)(2), which emphasizes the importance of an individualized compatibility determination in each case. It reads as follows: "The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted."

The Hearing Examiner finds that many of the physical and operational characteristics of the proposed use are inherent – the building, the lighting, the amount of parking, the availability of the drive-through lane and associated facilities, and the amount of traffic. It is inescapable, however, that three salient features of the proposed use are not typical or necessarily associated with the use: hours of operation until 2:00 a.m., seven days a week; a location in very close proximity to residences, in a shopping center that was approved without adequate buffering due to a long-ago zoning error; and an inability to provide adequate buffering for residential neighbors due to the limitations of Petitioner's lease. The Hearing Examiner considers these to be non-inherent adverse effects, all of which are inextricably related. The proposed hours of operation might be acceptable in another location classified under the C-2 Zone, and perhaps a location close to residences could be acceptable with very significant buffering, but here, the combination of proximity and very limited buffering is fatal to the application.

The evidence is overwhelming that a drive-through open until 2:00 a.m. would have adverse effects on the nearby residential neighborhood, and particularly on the closest neighbor, whose

property line is a mere 45 feet from the proposed drive-through entrance. The evidence suggested that sound from the speaker box would be controlled, but did not address sound from the vehicles themselves, the customers and their music. The proposed use would attract traffic to the very edge of this residential neighborhood, at a time when most people are asleep, bringing with it not only noise but also fumes and headlights. The neighbors have a legitimate concern that an establishment open until 2:00 a.m. would attract undesirable nighttime activity, the cumulative effects of which, with the 24-hour 7-Eleven, could have a severe adverse effect on this neighborhood. Mr. Lubin's testimony that he does not expect loitering at this location, while apparently sincere, had no foundation, because he admittedly has no familiarity with current nighttime activity in the vicinity. Technical Staff's recommendation of approval was contingent on a reduction in the hours, but the Hearing Examiner believes that Staff did not go far enough. At this location, in such close proximity to a residential neighborhood, with very little buffering, the Hearing Examiner would consider any hours later than 10:00 p.m. on weeknights and 11:00 p.m. on weekends to be incompatible with the neighborhood.

Petitioner has made efforts to improve the buffering situation, but they are woefully inadequate. As a threshold matter, no probative evidence was presented to demonstrate that the landlord had agreed to replace the fence, or to allow Petitioner to plant the proposed trees, much less to having shopping center property, outside Taco Bell's lease area, encumbered by conditions of the requested special exception requiring the installation of the fence and the planting and maintenance of the trees. Setting aside the issue of authorization, there was no substantial, probative evidence that a better fence and a single row of evergreen trees, planted in the scanty five-foot space between the parking lot and the fence, would provide anything but a limited visual screen. The neighbors would still be subject to the noise and fumes from the drive-through lane, and no evidence was presented as to whether they would be affected by headlights. Moreover, no evidence was presented as to the effectiveness of the visual screen, in light of the height of the adjacent residences, the proposed building, the parking lot lights and the fence and trees. The measures suggested by Community-Based Planning Staff at the MNCPPC provide a useful guide as to the type of buffering that might be adequate

to permit a use with such a high level of activity so close to residences. These measures included replacing the fence with a solid, masonry wall; widening the buffer strip from five feet to 12, creating room for substantial evergreen plantings; eliminating some parking places and moving others farther away from the fence. None of these measures has been proposed here.

Taco Bell's great liability in this case is that the landlord controls the buffer area, and as a grandfathered use, the shopping center apparently is under no legal pressure to provide perimeter buffering, and does not have any other incentive to do so. Technical Staff and one member of the Planning Board suggested that Petitioner should not be held responsible for conditions beyond its control, such as inadequate perimeter buffering. Mindful that Petitioner bears the burden of demonstrating compliance with all applicable general and specific conditions for the use, the Hearing Examiner takes an opposite view: like an applicant that must work around environmental constraints to design a compatible site plan, Taco Bell had the responsibility to work within its legal constraints to design a compatible site plan. In this case, considering the constraints at work, that may have been impossible.

Petitioner's Counsel cited in her closing argument two past special exception approvals where the special exception area was limited to a leased area within a shopping center. The Hearing Examiner notes that in both of these cases, S-912, approved in 1984, and S-1235, approved in 1985, the drive-in restaurant site was not adjacent to a residential area, and the shopping center was separated from the nearest residential area by other commercial and industrial development. In neither case did any issue arise related to the buffering or lease lines. Moreover, even if a similar issue had been decided differently in an earlier case, the Board is not bound by past decisions. Each case is evaluated on its own merits, based on the evidence of record and the legal standards in place at the time of the decision.

Ms. Leatham also suggested, in her closing, that the two homes closest to the subject site would be buffered by their garages, which are located between the homes and the shopping center fence. This contention was made by counsel, not a fact or expert witness, therefore its probative value

is highly questionable. More importantly, a special exception applicant cannot rely on buffering provided on a neighbor's property. The neighboring homeowners are free to remove their garages at any time and put up a Jacuzzi in that space, or plant a garden. Taco Bell bears sole responsibility for creating a compatible site plan, including appropriate buffering, without reliance on any features of neighboring properties other than immutable physical characteristics.

In addition to non-inherent adverse effects, the inherent adverse effects of the proposed use are substantial. The use would bring high levels of traffic and activity, with noise, fumes and trash likely to impact the neighborhood. Mr. Lubin provided assurances about clean-up on site, but was unable to provide the same assurances about trash that might be thrown or blown over the fence or down the block. The Hearing Examiner is persuaded that the lighting plan would prevent light spillage into the neighborhood, but no evidence was presented about glare. No evidence was presented about current circulation patterns in the lower parking lot, and in particular whether those patterns suggest a likelihood of conflicts between vehicles entering or waiting in the drive-through lane, and vehicles trying to enter or exit the shopping center via the eastern curb cut on North Westland Drive. Probative, unrefuted evidence was presented that large trucks frequent the parking lot, but no evidence was presented to suggest how that would affect access to and use of the drive-through lane. Regarding traffic impacts, the Hearing Examiner was persuaded that the proposed use would not have adverse impacts on the safety of the intersection of Rte. 355 and North Westland Drive, but the evidence about potential impacts on Walnut Hill Road from increased cut-through traffic was inconclusive.

Ms. Kabo testified that the proposed development was designed to fit into the neighborhood harmoniously. She noted that the building was located as far as possible from the residential area; the rear façade was designed to face the residential neighborhood, with no lighting or building activity on that side; truck deliveries were limited to the morning hours to avoid nighttime truck activity; the speaker box would face away from residences; the escape lane would speed up the process, reducing noise; all cars would be directed to use the western curb cut, rather than the one closest to residences; and the building would incorporate a new heating and cooling system designed

to prevent odors and fumes from leaving the building. Tr. Jan. 13 at 89-92. Ms. Kabo's testimony correctly points out the efforts that Taco Bell has made to try and craft a compatible site plan. Even best efforts, however, sometimes are not enough. These efforts would make the proposed use less incompatible with nearby residences, but are not enough to consider it compatible.

For all of the reasons stated above and in the following sections, the Hearing Examiner concludes, based on a preponderance of the evidence, that the inherent and non-inherent adverse effects of the proposed use are more than sufficient to warrant denial of the application.

### ***B. Specific Standards***

The specific standards for a drive-in restaurant are found in §59-G-2.16. As outlined below, the evidence establishes that the proposed use would not satisfy the specific standards.

#### **Sec. 59-G-2.16. Drive-in restaurants.**

A drive-in restaurant may be allowed, upon a finding, in addition to findings required in division 59-G-1, that:

- (a) The use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.

Conclusion: The evidence supports a conclusion that the noise and level of activity associated with the proposed use, with 30 to 35 cars per hour during peak times and hours of operation until 2:00 a.m., seven days a week, would rise to the level of a nuisance at the proposed location. Evidence concerning fumes and odors is not sufficient to support a conclusion as to whether such impacts would rise to the same level. The evidence does not support a conclusion that the proposed illumination would be a nuisance.

- (b) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.

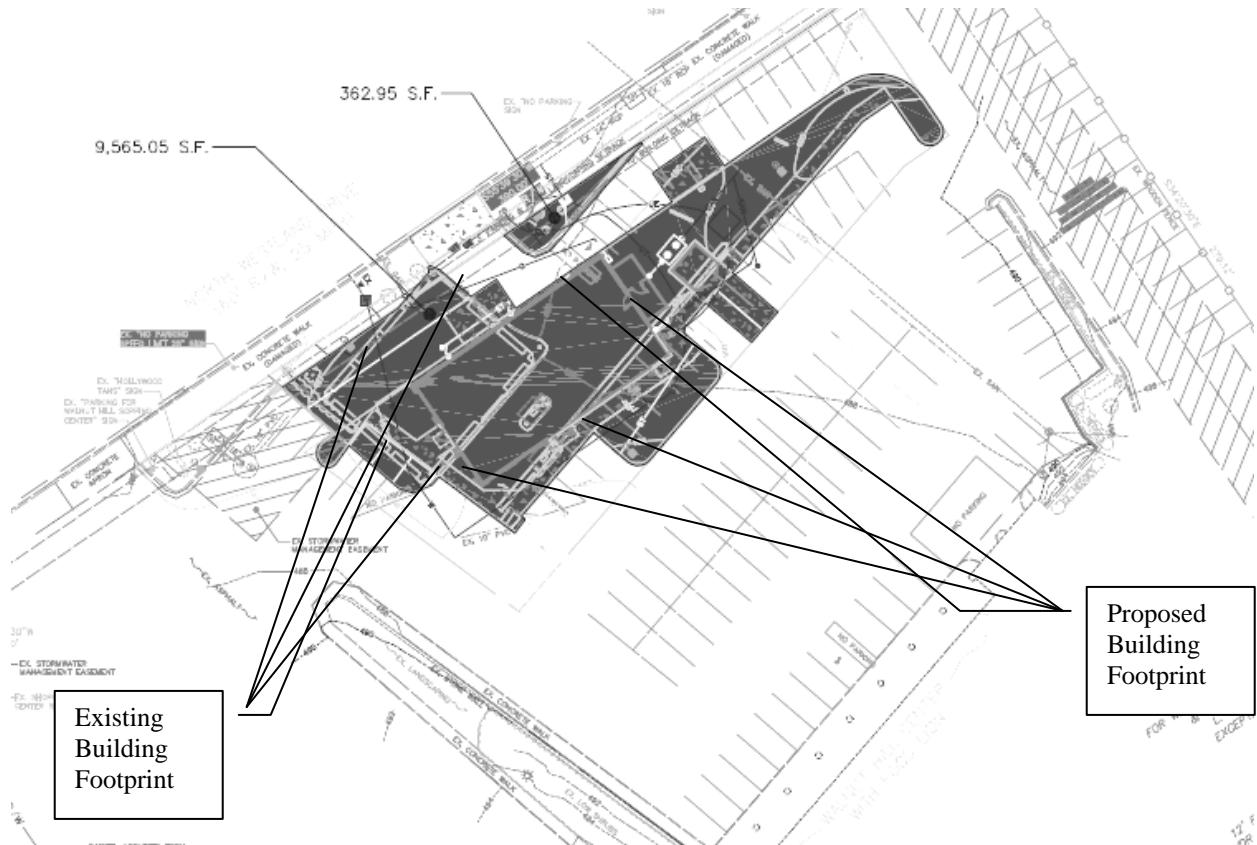


Conclusion: As discussed in Part II.F.2, the Hearing Examiner is persuaded, based on the preponderance of the evidence, that the proposed use would not create a traffic hazard at the intersection of North Westland Drive and Rte. 355. The evidence is inconclusive, however, as to whether the use would create a traffic hazard due to conflicts between drive-through customers and other vehicles trying to use the eastern curb cut on North Westland Drive. The evidence is also inconclusive as to whether the proposed use would create a traffic nuisance by drawing additional cut-through traffic to the residential block of Walnut Hill Road immediately east of the shopping center. Accordingly, the Hearing Examiner concludes that Petitioner has not demonstrated compliance with this requirement.

- (c) The use of the proposed location will not preempt frontage on any highway or public road in such manner so as to substantially reduce the visibility and accessibility of an interior commercial area zoned or proposed for commercial use which is oriented to the same highway or public road.

Conclusion: Community member Albert Parr argued that this requirement is not satisfied, because the proposed Taco Bell would have a much larger footprint than the existing building, and would block significantly more of the view of the 7-Eleven, the music store and the auto parts shop from North Westland Drive than is currently the case. Mr. Parr's testimony gains some support from a drawing that Taco Bell submitted, which superimposes the proposed building on the existing one. See Ex. 60(f). Based on the Hearing Examiner's review of the drawing, which is reproduced below, it appears that the larger footprint of the proposed building and its more central location on the site, compared to the existing building, could result in substantially reducing the visibility of the lower level stores, which are zoned for commercial use and oriented to the same public road. (It does not appear that accessibility would be affected.) The Hearing Examiner concludes that Petitioner has not demonstrated compliance with this requirement.

**Proposed Building Superimposed on Existing Building, Ex. 60(f)**



- (d) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, slightly, solid fence, not less than 5 feet in height, together with a 3-foot wide planting strip on the outside of such wall or fence, planted in shrubs and evergreens 3 feet high at the time of original planting and which shall be maintained in good condition. Location, maintenance, vehicle sight distance provisions, advertising and parking areas pertaining to screening shall be as provided for in the requirements contained in article 59-E.

**Conclusion:** In the present case, the abutting residential properties would be screened by a fence (which would, per Petitioner's testimony, be replaced with a substantial, slightly, solid fence) of the requisite height. There is no provision, however, for a three-foot planting strip on the outside of the fence, which would require encroaching on the existing parking spaces. Accordingly, the Hearing Examiner concludes that this requirement would not be satisfied.

- (e) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from, such use are prohibited.

Conclusion: Petitioner did not address this requirement in presenting its case. Reviewing the site plan, however, the Hearing Examiner finds that it supports a conclusion that this condition would be satisfied.

(f) Lighting is not to reflect or cause glare into any residential zone.

Conclusion: No substantial, probative evidence was presented concerning reflected light or glare. Petitioner has not demonstrated compliance with this requirement.

(g) When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot, as defined in section 59-A-2.1, and such driveways shall not exceed 25 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 60 feet from the centerline of any abutting street or highway.

Conclusion: The site plan and the testimony of Petitioner's site planner demonstrate that this requirement would be satisfied.

### ***C. General Standards***

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioners' written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

#### **Sec. 59-G-1.21. General conditions:**

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

Conclusion: A drive-in restaurant is a permitted use in the C-2 Zone.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would not comply with the standards and requirements set forth for the use in Code §59-G-2.16, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The evidence supports Technical Staff's conclusion that the proposed use would be consistent with the land use recommendations of the *1988 Gaithersburg Vicinity Master Plan*.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed use would not be in harmony with the general character of the neighborhood due to the intensity and character of activity, with significant amounts of traffic, noise and exhaust fumes, late-night operating hours, potential adverse effects on local roads from cut-through traffic, and parking in very close proximity to residences, with little buffering.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that although the proposed use would bring aesthetic improvement to a run-down site, overall it would be detrimental to the use, peaceful enjoyment and economic value of nearby residential properties due to the proximity of the site to residential uses, Petitioner's inability to control the buffer area and the proposed late-night hours.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Petitioner has not demonstrated that the proposed use would not cause objectionable noise, fumes, glare or physical activity, due to the proximity of the site to residential uses, Petitioner's inability to control the buffer area and the proposed late-night hours.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Technical Staff reports that there are no special exception uses in the nearest residential development adjoining the shopping center to the east. The adverse effects generated by the proposed use would be the result of its own operation, not of increasing the intensity of existing special exception uses.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Petitioner has not demonstrated that the proposed use would not adversely affect the health, safety, security or general welfare of nearby residents due to the proximity of the site to residential uses, Petitioner's inability to control the buffer area and the proposed late-night hours. As the Planning Board concluded, approval of this special exception would impose additional compatibility problems on an area that is already afflicted with compatibility problems – or, as one neighbor put it, approval would compound the effects of a zoning error made many years ago.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the proposed use.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a

preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would not be required. The traffic study and testimony demonstrate that the proposed use would satisfy Local Area Transportation Review requirements. Policy Area Transportation Review requirements no longer apply, per the current AGP Policy Element.

- (ii) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The preponderance of the evidence supports a conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic on the public roads. The record does not demonstrate, however, that on-site circulation would be safe with the proposed use in place.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that Petitioner has not met the burden of proof and persuasion.

### **59-G-1.23 General Development Standards**

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, applicable parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F; must incorporate glare and spill light control devices to minimize glare

and light trespass; and may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles.

*Conclusion:* As discussed in Part II.H. above, the proposed development would satisfy the applicable development standards of the C-2 Zone. The preponderance of the evidence supports a conclusion that the available shopping center parking would be adequate for the use, although there was evidence to suggest that large trucks sometimes occupy many of the spaces. The proposed development is exempt from forest conservation requirements. A variance would be obtained, if the special exception were granted, for one sign that would be in excess of the number permitted; all other signs would comply with Article 59-F. Lighting would incorporate full shielding, although there was no evidence concerning glare. Illumination levels along side lot lines would not exceed 0.1 foot candles. The rear lease line abuts the lower level shopping center, which Petitioner would light appropriately.

#### ***D. Community Need***

As discussed in detail in Part II.G above, the Applicant has failed to carry its burden of demonstrating that “a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.” § 59-G-1.25. Petitioner’s Need Analysis provided no evidence as to the reliability of its data; did not explain either the derivation or the implications of its demographic data; failed to provide an adequate basis for its Market Area definition, e.g. the number of minutes of drive-time selected, and the accuracy of using driving time alone to define the area; relied on data that was not provided, even in summary form; and used a Market Area map whose accuracy was called into question by opposition evidence.

Technical Staff’s Need Analysis was utterly unpersuasive. It was based on the wrong Zoning Ordinance section; it offered no explanation for why a zip code area was considered a reasonable proxy for the market area; it did not explain its methodology or provide any analysis, but made a series of unsupported, conclusory statements; and, as demonstrated by Mr. Conter, even the minimal research undertaken was not sufficiently accurate to support the conclusion drawn.

For all of these reasons, and those stated in Part II.G above, the petition should be denied for failure to demonstrate community need for the facility.

## VI. RECOMMENDATION

Based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2642, which requests a special exception under the C-2 Zone for a drive-in restaurant, to be constructed on property located 16575 South Frederick Avenue in Gaithersburg, Maryland, known as Parcel B of Section One, Walnut Hill subdivision, be ***denied***.

Dated: March 24, 2006

Respectfully submitted,

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Françoise M. Carrier  
Hearing Examiner